(15,839.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 566.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFFS IN ERROR,

vs.

S. W. HOLLADAY; GEORGIA C. O. HOLLADAY, MARY W. MASTICK, EXECUTRIX OF S. L. MASTICK, DECEASED, AND R. G. DAVISSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 & 2 No. 15379.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, by Jo. HAMILTON, Attorney General, at the Relation of Andrew J. Bryant, Plaintiff and Appellant,

vs.

SAMUEL W. HOLLADAY *et als.*, Defendants and Respondents.

Transcript on Appeal from Judgment and from Order Denying Motion for New Trial.

W. H. H. Hart, attorney general, attorney for plaintiff; Craig & Meredith and William Matthews, of counsel for plaintiff.

S. W. & E. B. Holladay, Mastick, Belcher & Mastick, attorneys for defendants.

Filed this — day of May, 1893.

L. H. BROWN, *Clerk*,
By —— ——,
Deputy Clerk.

3 In the Supreme Court of the State of California.

Transcript on Appeal from Judgment, and from Order Denying Motion for New Trial.

Judgment-roll.

In the District Court of the 15th Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA, by Jo. HAMILTON, Attorney General, at the Relation of Andrew J. Bryant, Plaintiff,

vs.

SAMUEL W. HOLLADAY, GEORGIA C. O. HOLLADAY, S. L. MASTICK, R. G. DAVISSON, Defendants.

4 *Complaint.*

The People of the State of California, by Jo. Hamilton, attorney general of said State, at the relation of Andrew J. Bryant, allege:

That said Andrew J. Bryant is a citizen of the United States of America, and a citizen, resident, and tax-payer, and a householder and freeholder of the city and county of San Francisco, in said State of California.

That a certain piece or parcel of land, situate in said city and county in what is known as the Western addition thereof, and bounded by Gough street on the east, Washington street on the

north, Laguna street on the west, and Sacramento street on the south was heretofore, to wit: on the eleventh day of March, A. D. 1858, by the lawful owner and proprietor thereof, lawfully dedicated to public use as a public square, by the name of "Lafayette park," and such dedication accepted by the public, and then was, and still is, laid down upon the official map of said city and county as a public square, as aforesaid.

That said public square is valuable for the purposes of such public square, and with other public squares and plazas in said city and county, dedicated at the same time, was intended to and would and does add to the comfort, convenience and health of the
5 citizens and residents of said city and county, and of the people of said State, visiting or passing through said city and county.

That the defendants have erected and constructed fences within and upon said premises and public square, which fences enclose, and are the means of excluding all persons other than said defendants, their agents and employees from all of that certain piece or parcel of said public square which is bounded and described as follows:

Commencing at a point on the westerly line of Gough street, distant 127 feet $8\frac{1}{4}$ inches northerly, from the N. W. corner of Sacramento and Gough streets; thence running in a northerly direction along said westerly line of Gough street 324 feet $1\frac{1}{2}$ inches; thence at right angles westerly $412\frac{6}{12}$ feet; thence at right angles southerly 324 feet $1\frac{1}{2}$ inches; thence at right angles easterly $412\frac{6}{12}$ feet to the place of commencement, which fences still continue and are maintained there by said defendants; and the said defendants have erected and maintained and still maintain a dwelling-house, and outbuildings, and other permanent improvements within and upon the premises last above described, and have threatened to erect, construct and continue, and now threaten, and it is their purpose to erect, construct and continue upon the premises last aforesaid, other permanent improvements, and to continue and maintain
6 upon said "Lafayette park," the said fences, dwelling-house and outbuildings and other permanent improvements first aforesaid.

That the continuance of said fences, dwelling-house, outbuildings and other permanent improvements erected and constructed, as aforesaid, upon said public square will greatly — irremediably interfere with and hinder the use by the public of said public square, first aforesaid, and the public will be irremediably prejudiced and injured thereby.

That if the said purpose and threatening of the defendants be pursued and carried out, it will greatly and irremediably interfere with and hinder the use and enjoyment by the public and the citizens of said city and county, of said public square called "Lafayette park."

That the said fences, dwelling-house, outhouses and other permanent improvements now maintained, as aforesaid, are, and will continue to be, until removed therefrom, and such other permanent

improvements which defendants threaten and have a purpose as aforesaid to erect, construct and maintain, will if so erected, constructed and maintained, be obstructions and common public nuisances in and upon said "Lafayette park."

That ever since the 1st day of July, A. D. 1856, the city and county of San Francisco has been and is a municipal corporation, pursuant to the laws of the State of California.

7 That said relator and the People of the State of California are, by reason of said obstructions and nuisances, prevented from the free use of said Lafayette park, and from any use of that part of said Lafayette park secondly hereinbefore described, and so will be prevented unless and until such obstructions shall be removed and such nuisances abated.

That the defendants will continue such obstructions and nuisances unless enjoined and restrained from so doing, and compelled to remove such obstructions and abate such nuisances by the decree of this honorable court.

Wherefore, the people of said State by their attorney general aforesaid, pray:

First.

That said fences, dwelling-house, outbuildings and other improvements upon said premises be by the judgment and decree of this honorable court determined to be nuisances.

Second.

That the defendants be decreed to remove said fences, dwelling-house, outbuildings and other improvements from said Lafayette park, and to abate such nuisances.

Third.

That by the decree of this honorable court, said defendants,

8 their agents, attorneys, employees, servants and assigns, be forever restrained from placing, erecting, constructing, maintaining or continuing such or any fences, dwelling-house, outbuildings, or other improvements, or any of them, or any obstructions, or nuisances in, upon, or across said "Lafayette park;" and in the meantime and until the final determination of this cause, and the final decree of this court herein, said defendants, their agents, attorneys, employees, servants and assigns be enjoined and restrained from maintaining, or continuing said or any fences, dwelling-house, outbuildings, improvements or any obstructions or nuisances, in, upon or across said Lafayette park.

Fourth.

That by the final decree herein, it be decreed that the defendants, employees, servants and assigns leave said Lafayette park free and unobstructed for the use of the people of the State of California as a public square.

Fifth.

For such other and further relief, or either, as may be just, and for costs of suit.

JO. HAMILTON,
Attorney General of the State of California.

W. C. BURNETT,
Of Counsel for Pl't'ff, upon Whom Papers May be Served at His Office, in San Francisco, California.

9 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Andrew J. Bryant, being duly sworn, deposes and says, that he is the relator mentioned in the foregoing complaint, that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, he believes the same to be true.

A. J. BRYANT.

Subscribed and sworn to before me this eleventh day of February, A. D. 1878.

H. W. KIND,
Dep. Co. Clerk.

(Endorsed:) "Filed March 5th, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, deputy clerk."

Permit to Sue in the Name of the People.

THE PEOPLE OF THE STATE OF CALIFORNIA, by JO. HAMILTON, Attorney General, *ex Rel.* ANDREW J. BRYANT
vs.
SAMUEL W. HOLLADAY *et al.*

ATTORNEY GENERAL'S OFFICE, *February 13th*, 1878.

10 Upon reading the petition filed in the above-entitled matter, and being satisfied therefrom that this is a proper case for the use of the name of the People of the State of California and their attorney general for the enforcement of the right and the correction of the wrong in the said matter set out, leave is hereby given Andrew J. Bryant, the petitioner, and W. C. Burnett, his attorney, to use the name of the People of the State of California, and to sue in such name in such court as may have jurisdiction of the subject-matter, and of the parties, and to sign the name of the attorney general to all pleadings and papers in any manner connected therewith, to the proper enforcement of the rights and correction of the wrongs in said petition set out. Upon the express terms and conditions, however, that the State of California shall in no event be held responsible for any costs, charges, or attorney's fees in or about the

said suit or suits, in any manner connected therewith. And to this end the said Andrew J. Bryant, relator, shall, at the time of filing the complaint herein, file a good and sufficient bond with the said complaint, to that effect, with sufficient sureties, in the sum of —— dollars. And provided further, that the attorney general may at all times, at any and every state of the said suit, withdraw therefrom and discontinue or dismiss the same, as to him may seem fit and proper.

11 Given at the office of the attorney general of California this thirteenth day of February, 1878.

JO. HAMILTON,
Attorney General.

(Endorsed:) "Filed 5th day of March, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, dep. cl'k."

(Title of Court and Cause.)

Summons.

Action brought in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The People of the State of California send greeting to Samuel W. Holladay, Georgia C. O. Holladay, S. L. Mastick, R. G. Davisson, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifteenth judicial district, of the State of California, in and for

12 the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a judgment and decree of this court, adjudging and decreeing the fences, dwelling-house, outbuildings and other improvements upon that certain piece or parcel of land lying in the city and county aforesaid, and in wha is known as the Western addition thereof, and lawfully dedicated to public use as a public square by name of "Lafayette park," and in the complaint filed herein particularly described, special reference to which is hereby made, to be a public nuisance, and that said defendants be decreed to remove the said fences, dwelling-house and outbuildings and other improvements, and to abate said nuisances, and that it may be further adjudged and decreed that the said defendants, their attorneys, servants and assigns, be forever restrained from constructing or maintaining said fences and improvements, or any of them, the said nuisances, upon or across said "Lafayette park," and in the

meantime and until final determination of this action and the final decree of this court herein, said defendants, their attorneys
13 and servants and assigns be enjoined and restrained from maintaining said improvements, obstructions or nuisances in, upon or across said "Lafayette park," and by the final decree herein, it may be adjudged and determined that the defendants, their servants and assigns, leave said "park" free and unobstructed for the use and benefit of the public of the State of California, and for general relief, and for costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and seal of the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, this 5th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] THOS. H. REYNOLDS, *Clerk*,
By M. J. MACGRATH, *Deputy Clerk*.

Proof of Service of Summons.

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on
14–35 the 7th day of March, A. D. 1878, and personally served the same on the 9th day of March, A. D. 1878, upon Sam'l W. Holladay, Georgia C. O. Holladay, and R. G. Davisson, and on the 11th day of March, 1878, upon S. L. Mastick, the therein-named defendants, by delivering to Sam'l W. Holladay, Georgia C. O. Holladay, S. L. Mastick, and R. G. Davisson, and to each of them, said defendants personally, in the city and county of San Francisco, a copy of said summons, the copy so served upon Sam'l W. Holladay being attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 11th day of March, 1878.

MATTHEW NUNAN, *Sheriff*,
By GEO. T. WRIGHT, *Deputy Sheriff*.

(Endorsed:) "Filed March 11th, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, deputy clerk."

36 *Order Assigning Cause to Superior Court.*

In the Superior Court, City and County of San Francisco, State of California.

THE PEOPLE, etc., Plaintiff,
vs.
S. W. HOLLADAY *et al.*, Defendants. } No. 10459.

JANUARY 23, 1880.

It is ordered that the above-entitled cause (pending in the district court of the 15th judicial district of the State of California,

in and for the city and county of San Francisco, on the
37–67 31st day of December, A. D. 1879) be and the same is hereby assigned to department No. 5 of this court.

WM. P. DAINGERFIELD,
Presiding Judge.

(Endorsed:) "Filed Jan'y 23, 1880. William A. Stuart, clerk, by Ed. A. Abell, deputy clerk."

68 *Order Transferring Cause for Further Hearing.*

In the Superior Court, City and County of San Francisco, State of California.

PEOPLE OF STATE OF CALIFORNIA, Plaintiff,
vs.
SAMUEL W. HOLLADAY, GEORGIA C. O. HOLLADAY, S. L. Mastick, R. G. Davisson, Defendants. } No. 10459, 15.

AUGUST 15, 1887.

69–71 I hereby consent that the above-entitled cause pending before me, in department No. five be transferred to Judge Maguire, dep't 4, for hearing.

JOHN HUNT, *Judge.*

I consent that the above-entitled cause be transferred to me.

JAMES G. MAGUIRE, *Judge.*

Ordered that the above-entitled cause be transferred to Maguire, judge, for the hearing of all further proceedings.

J. V. COFFEY,
Presiding Judge.

Dated this August 15th, 1887.

(Endorsed:) "Filed August 16th, 1887. Wm. J. Ruddick, clerk, by A. J. Raisch, deputy clerk."

72 (Title of Court and Cause.)

Transferred from Late 15th District Ct., No. 10459 Therein.

Amended Answer.

Now come S. W. Holladay, Georgiana C. Ord Holladay and R. G. Davisson, defendants in the above-entitled cause, and for their amended answer to the complaint herein, filed by leave of the court first had and obtained, they allege and deny as follows:

73 They deny that the land firstly described in the complaint was on the eleventh day of March, 1858, or ever at any time dedicated to public use either as a public square or for any public use whatever. They deny that it was ever dedicated to public uses

by the name of Lafayette park or otherwise, or that the alleged dedication or any dedication thereof was ever accepted by the public, but, on the contrary, these defendants allege that said land described in the complaint as Lafayette park is and has been continuously since the year 1850 held and possessed, occupied and claimed as private property by these defendants and others under and through some of whom these defendants claim title to the parts thereof hereinafter particularly described.

Defendants allege that such possession and occupation last stated, is and has been for all the times stated, adverse to and inconsistent with all and every right, title and claim of the people of the State or of the public, and that the same has been so possessed, occupied and held in adverse and private ownership.

Defendants admit that said land appears and is laid down on the official map of the city and county of San Francisco, as Lafayette park, but they aver that it was so placed and laid down
74 thereon without right and without the consent or authority of the owners of the land, and without any competent authority.

Defendants deny that said so-called public square is valuable for the purposes of such or a public square, but, on the contrary, they aver that it is of no value for the purposes of such or a public square, and allege that said land is valuable only for the private purposes for which it is now used to the exclusion of all public uses thereof whatsoever, and they deny that it was, at the same time, with other public squares and plazas in said city and county, or with any public square and plaza therein, or at any time or in any way whatever, dedicated to public use, or was intended to or would or does add to the comfort, convenience or health of the citizens or residents of said city and county, or of the people of said State visiting, or passing through, said city and county, as a public park, square or plaza, or otherwise than as the private property of these defendants and others, the private owners and occupants thereof.

Defendants admit that they have severally each upon the lots or parcels by him or her separately and severally claimed, erected and constructed fences within and upon portions of the premises in the said complaint named as a public square, and within and upon all that portion thereof described as follows, to wit:

75 First. Commencing at the corner formed by the junction of the southerly line of Clay street with the easterly line of Octavia street; thence running easterly along the southerly line of Clay street two hundred and seventy-five (275) feet; thence at right angles southerly to a point midway between Clay and Sacramento streets; thence at right angles westerly and parallel with and midway between Clay and Sacramento streets two hundred and seventy-five (275) feet to the east line of Octavia street; thence northerly along the easterly line of Octavia street to the place of beginning.

Second. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence westerly along the north line of Clay street four hundred and twelve and one-half (412½)

feet to the east line of Octavia street; thence northerly along the last-named line to a point midway between Clay and Washington streets; thence easterly and parallel with and midway between Clay and Washington street four hundred and twelve and one-half (412½) feet to the west line of Gough street; thence southerly along the last-named line to the place of beginning.

And admit that they severally still continue to maintain such fences and a dwelling-house and outbuildings and other permanent improvements thereon, and that it is the purpose of the
76 defendants, severally, each upon his own lands, to maintain the said improvements and to erect, construct and maintain other permanent improvements on said lands, and that the continuance of the said fences, houses and other improvements on said lands now does and will exclude the public therefrom, and now does and in the future will interfere with and hinder and prevent the use thereof by the public as a public square or otherwise, but defendants deny that the plaintiffs or the public, or any person whatever, will be greatly or in any way injured or prejudiced thereby, or that the said fences, house, outhouses and permanent improvements are or will be obstructions or nuisances in any way whatever, and deny that the defendants, or any or either of them, have occupied or possessed, or claimed the right to occupy, hold or improve, or erected or built fences or house or improvement of any kind upon or within any portion of the lands in the complaint described, except the portions thereof hereinbefore particularly described.

These defendants allege that the above description includes all the lands claimed by them and they disclaim any interest in the land included within the limits of Clay street.

And for other and further answer and defense these defendants allege: That the plaintiffs ought not to have or maintain
77 this action, for this, viz: that this same matter and all the matters alleged in this complaint touching the land in question, have been and were, before the commencement of this suit, fully litigated and finally adjudged, decided and determined against the plaintiffs, and in favor of these defendants; and that all and singular the matters in issue and involved in this action are *res judicatæ*.

And in support thereof these defendants allege, that heretofore, to wit: on the 16th day of November, 1863, The People of the State of California, the plaintiffs herein, at the relation of one George T. Bohen, by their attorney general, commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (one of the defendants herein), John Doe, Richard Roe and A. P. Anderson, as defendants therein.

That in and by said complaint, the plaintiffs alleged that this same land had been, prior to November 16th, 1863, lawfully dedicated to and accepted by the public as a public plaza or square, by the name of Lafayette square, and that the defendants had actually commenced to erect and construct fences and other permanent im-

provements upon said square or plaza; wherein said plaintiff
78 prayed that the defendants therein, their workmen and servants might be enjoined from further erecting or constructing thereon, any fences or other works or obstructions, and that said defendants might be ordered to remove therefrom all fences or other obstructions placed thereon by said defendants.

Thereupon an injunction issued upon said complaint against said defendants.

The defendants in the said complaint, other than S. W. Holladay, were his workmen, at the time employed by him and at work on the premises, but having no interest therein, said S. W. Holladay was at the time in the sole and exclusive possession and occupation of said premises and claiming the same in his own right.

That afterwards, to wit: November 27th, 1863, said defendant, S. W. Holladay, and the other defendants named in said complaint, appeared in said action and filed their answer thereto; wherein they denied that said land therein mentioned was ever in any manner dedicated to the public or accepted by the public as a public square or otherwise or at all.

And in said answer, said Holladay claimed to be the owner of said land in his own right exclusively, adversely to all the world, and that he and his predecessors in interest therein had, held, occupied and claimed said premises continuously from the sum-
79 mer of the year 1854, down to the time of filing his said answer, to wit: November 27th, 1863.

Afterwards, said cause came on regularly for trial before the court, and the same was fully tried and submitted to the court for its decision, and afterwards, to wit: February 19th, 1876, said fourth district court duly gave and made its judgment and decree in said cause, wherein all the matters in issue and which were tried in said cause were decided and adjudged in favor of the defendants therein, which judgment is in the words and figures following, to wit:

In the District Court of the 4th Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex Rel.* GEORGE T. BOHEN, Pl'ffs,
vs.
S. W. HOLLADAY *et als.*, Defendants.

Judgment.

This cause having come on regularly for trial before the court without a jury, a trial by jury having been heretofore expressly waived by the parties in open court the cause was tried by
80 the court sitting without a jury, and witnesses for the respective parties having been duly sworn and examined, and certain documentary evidence having been read in evidence, and the cause duly submitted to the court upon briefs of the respective counsel.

And after due consideration thereof, the court having afterwards, on the eleventh day of July, 1864, rendered its decision thereon upon all the issues, against the plaintiff and in favor of the defendants, and ordered the injunction therefore issued in the cause against the defendants to be dissolved, and directed in said order counsel to draw findings.

And the counsel herein having by their stipulation in writing filed herein, expressly waived written findings and consented that judgment be entered without written findings, pursuant to the order and decision of the court:

It is now, therefore, by the consideration of the court ordered, adjudged and decreed that the plaintiffs take nothing by this action, but that the defendant, Samuel W. Holladay, was at the time of the commencement of this suit and is in the true and lawful possession as the owner thereof of so much of the land and premises described in the complaint as is claimed and described in his answer as "the six fifty-vara lots lying three of them on each side of Clay street, between Gough and Octavia streets;" which
81 lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

First. On the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

That as to said parcels of land last above described as "First" and "Second," it is adjudged and decreed that the defendant, Samuel W. Holladay, was, from the month of February, 1854, in the actual use, occupation and possession of the same, as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon; and that the said land never was, nor has been, by the lawful owner or proprietor thereof, lawfully, nor in any way dedicated to, accepted or used by the public as a public square or plaza, or for any public use, but that the same was all that time, and is the private property, and in the actual and lawful possession of the defendant, Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant, Hazard P. Her-
82 rick (who in the complaint is called by the fictitious name of John Doe) and the defendant, A. P. Anderson, had not, at the time of the commencement of this suit, or at any other time, any right or claim to any of the premises, except as servants and workmen under and in the employ of defendant, Holladay.

And it is further adjudged and decreed that the defendant, S. W. Holladay, has not, nor has he had at any time prior to the commencement of this suit, any right or title in or to, or the possession of any part of the premises described in the complaint, consisting of four blocks bounded by Washington, Gough, Sacramento, and Laguna streets, except the six fifty-vara lots, mentioned in his

answer and embraced in the parcels "First" and "Second" hereinabove described.

Feb'y 19th, 1876.

R. F. MORRISON, *Judge.*

Said judgment was duly recorded February 23rd, 1876, Book M, page 29 of judgments.

Said judgment has never been appealed from, vacated or reversed, or in any way modified, but the same still remains a final and valid judgment in the premises between said parties and their privies and successors in interest.

The land in controversy in that suit is the same land in controversy in this suit, and no other or different land.

83 The plaintiffs in that suit are the same plaintiffs as in this suit.

The controversy, issues and cause of action in that suit were the same as in this suit, and none other or different.

The defendant, S. W. Holladay, named in that suit is the same S. W. Holladay who is defendant in this suit; who has conveyed the premises in parcels to other parties by deeds of conveyance, duly executed and recorded, as hereinafter mentioned, under and through which deeds the other defendants claim title and possession of said land.

That after the rendition of the judgment above mentioned, said S. W. Holladay, for a full and adequate consideration, sold and conveyed to Henry H. Haight, one parcel of said premises, namely, the lot at the northwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street, by one hundred and twenty-seven feet and eight and one-fourth inches on Gough street, by deed, dated October 19th, 1868, and recorded October 20th, 1868, in Liber 466 of Deeds, page 127, of the county recorder's office of said city and county of San Francisco.

That afterwards, to wit: February 16th, 1869, the said Henry H. Haight, for full value, to wit, for the sum of $7,050, sold and conveyed the lot last named to R. G. Davisson one of the defend-

84 ants herein, by deed of conveyance duly recorded February 18th, 1869, in Liber 480 of Deeds, page 361, in the county recorder's office of said city and county, and the defendant R. G. Davisson entered under said deed, relying on the same as a title secured and settled by the judgment aforesaid, and he still so occupies, claims and holds the said lot in his possession.

That after said adjudication, to wit: on the 16th day of July, 1868, the said S. W. Holladay sold and conveyed to S. L. Mastick, his codefendant herein, one other parcel of said premises, namely: the lot at the southwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street, by one hundred and twenty-seven feet eight and one-fourth inches on Gough street, for the price and consideration of $4,500 paid therefor; and the deed for which was recorded August 15th, 1868, in Liber 450 of Deeds, of the office of the county recorder of said city and county.

That under and by virtue of his said deed, said S. L. Mastick entered upon this lot so purchased, relying upon his said deed for the same as a title secured and settled by the judgment aforesaid.

That afterwards, to wit, May 5th, 1869, this defendant S. W. Holladay, conveyed by deed of that date, to defendant, Georgiana C. Ord Holladay, the rest of said land, namely:

85 First. The parcel bounded on the north by Clay street; on the west by Octavia street; on the south by a line midway between Clay and Sacramento streets, and on the east by a line two hundred and seventy-five feet east of Octavia street; and

Second. The parcel bounded on the west by Octavia street; on the north by a line midway between Clay and Washington streets; on the east by a line two hundred and seventy-five feet east of Octavia street; and on the south by Clay street, which deed was recorded May 8th, 1869, in Liber 506 of Deeds, page 157, in the office of the county recorder of said city and county of San Francisco.

And for a further, separate and distinct answer and defense to this action, these defendants allege—

That heretofore, to wit, on the 16th day of November, 1863, the plaintiffs herein, on the relation of one George T. Bohen, by their attorney general, commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (one of the defendants herein), John Doe, Richard Roe and A. P. Anderson, as defendants therein.

86 That the defendants John Doe, Richard Roe and A. P. Anderson mentioned in said complaint, were employees of the said defendant Holladay, and had not and did not claim any interest adverse to the plaintiff in said action.

That the defendant Holladay, in said action, on behalf of himself and his codefendants, filed his answer to the complaint therein, and afterwards on the 19th day of February, 1876, the court by its judgment duly given and made, adjudged and decreed that the land in said complaint described never was nor has been, by the lawful owner or proprietor thereof, lawfully, nor in any way dedicated to, or accepted or used by the public as a public square or plaza, or for any public use.

That the land described in the complaint in said action was also described in the said judgment and decree, and is the identical land described in the complaint herein.

That the defendants in this action claim title under the said S. W. Holladay, the defendant in the aforesaid action by deraignment of title subsequent in date to the rendition of said judgment.

That said judgment has never been appealed from, vacated, reversed, or in any way modified, but the same still remains a final and valid judgment in the premises between the said parties and their privies and successors in interest.

87 That the plaintiffs in said action are the same plaintiffs herein, and the defendants in said action are the predecessors in interest of the defendants herein.

And for another, further and separate answer and defense to this

action, these defendants allege: That the plaintiffs ought not to have or maintain this action for this, viz: That this same matter, and all matters in controversy herein, have been and were before the commencement of this action, fully litigated and finally adjudged, decided and determined in favor of the defendant, S. W. Holladay, and against the plaintiffs, in that certain action commenced in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, on the 17th day of December, 1864, by this defendant, S. W. Holladay, as plaintiff, against The City and County of San Francisco, a municipal corporation, as defendant.

That at the time said action was brought, and at all times since, all the right, title and interest of plaintiffs, if any they had or have, in and to the premises in the complaint described, was vested in the said city and county of San Francisco, in trust for plaintiffs, as trustee of an express trust.

Said trust arose by operation of the act of Congress of the United States, approved July 1, 1864, entitled "An act to expedite the settlement of titles to land in the State of California," and
88 plaintiffs have not at any time had any other or different title than the one vested in said city and county by said act of Congress.

That in said action above mentioned, the said city and county of San Francisco filed its answer to said complaint, and put in issue its title to the lands in the complaint herein described.

That whether or not the plaintiffs herein then had, or have ever had any right, title or interest in or to the premises described in the complaint herein, depended solely upon whether or not the said city and county of San Francisco had any right, title or interest in said premises.

That thereafter such proceedings were had that the said district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco by its judgment duly given and made, adjudged and decreed that the plaintiff in said action, was, at the time said action was brought, the owner in fee-simple absolute of an undivided nineteen-twentieths ($\frac{19}{20}$) of the land described in said action and in the complaint herein, as tenant in common with the said defendant The City and County of San Francisco, and the said defendant was the owner as tenant in common with the said S. W. Holladay of an undivided one-twentieth ($\frac{1}{20}$) of the land in the complaint described.

It was further adjudged and decreed in said action that
89 the title of the said S. W. Holladay be, and the same was, quieted as against the said city and county of San Francisco, and the said city and county of San Francisco was adjudged to have no right, title or interest therein, except the undivided $\frac{1}{20}$ thereof.

Said judgment has never been appealed from, vacated, reversed, or in any way modified, but the same still remains a final and valid judgment in the premises between the said parties and their privies and successors in interest.

That all the defendants in this action claim title under the said S. W. Holladay, by virtue of conveyances made by the said S. W. Holladay, subsequent to the rendition of said judgment.

That said judgment in said action was duly given and made on the 2[illegible]h day of September, 1867.

That the present action was brought by the authority and direction of, and at the sole instance of The City and County of San Francisco, defendant in the suit last named, and is and has been so conducted and prosecuted by its agents and attorneys, authorized and employed by it, and the costs and expenses of commencing and prosecuting this suit have been and are being paid by said city and county, the real party in interest herein.

And for further answer and defense, defendants aver that the land in controversy herein, namely, parcel one and parcel two, above described, is within and a part of the land mentioned
90 and described in the grant to the respective possessors thereof, June 20th, 1855, by ordinance No. 822, of the city of San Francisco, ratified and confirmed by an act of the legislature of this State, approved on the 11th of March, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the city."

That on and prior to January 1st, 1855, Philip W. Shepheard, S. W. Holladay and C. R. Saunders, claiming as tenants in common, were in the actual possession as tenants in common with each other, of a larger piece of land, including the above-mentioned parcels one and two, and their said possession of said land including said two parcels was continued from the summer of the year 1854 without interruption down to and including the year 1860.

That afterwards and prior to the commencement of each and all of the suits before mentioned, the said Shepheard and Saunders by good and sufficient deeds of conveyance, assigned and transferred all their interest in said two parcels of land to this defendant, S. W. Holladay, who thereby became and was the lawful owner, seized and possessed thereof; and afterwards and prior to the commencement of this suit, the defendants herein other than said S. W. Holladay, have by and through good and sufficient deeds
91 of conveyance to them respectively, derived all his right, title and interest in said two parcels of land, and said defendants are in possession of the same, and are the lawful owners thereof.

These defendants and their predecessors in interest therein, have held, occupied and claimed said land, in their own right, continuously from the year 1850 down to the present time.

Wherefore, defendants pray that the complaint be dismissed with costs.

S. W. HOLLADAY,
Attorney for Defendants.

WARREN OLNEY, *Of Counsel.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

S. W. Holladay being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

S. W. HOLLADAY.

Subscribed and sworn to before me this 9 day of April, 1888.

[SEAL.] H. A. COBB,
Notary Public.

92 (Endorsed:) "Service by copy admitted at 25 minutes past 9 a. m. 10th day of April, 1888. William Matthews, Craig & Meredith, of counsel for pl't'ff." "Filed in open court April 11th, 1888. Wm. J. Ruddick, clerk, by Fred. W. Lees, deputy clerk."

(Title of Court and Cause.)

In Open Court, December 12th, 1888. No. 10459, Late in 15th District Court.

Order Substituting Mary W. Mastick, Executrix, as a Party Defendant.

In this action, upon the suggestion of the death of S. L. Mastick, defendant herein, and the appointment of Mary W. Mastick, as executrix of his last will. It is ordered (upon consent of W. C. Belcher, Esq., counsel for said executrix) that said Mary W. Mastick, executrix, be substituted as a party defendant, on the record herein in the place of S. L. Mastick, deceased.

Minute Book 40, page 570, dep't No. 4.

93–110 In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, by Jo. Hamilton, Attorney General, at the Relation of Andrew J. Bryant, Plaintiffs,
vs.
SAMUEL W. HOLLADAY, GEORGIANA C. O. Holladay, Mary W. Mastick, as Executrix of the Last Will and Testament of S. L. Mastick, Deceased, and R. G. Davisson, Defendants.

Transfer-ed from Late 15th District Ct., No. 10459 Therein.

111 (Title of Court and Cause.)

Transferred from Late 15th District Ct., No. 10459 Therein.

Amended Answer of Defendant Mary W. Mastick, Executrix, etc.

112 Now comes the defendant Mary W. Mastick, executrix of the last will and testament of S. L. Mastick, deceased, and, by leave of the court first asked and obtained, files this, her amended answer to the complaint herein, and alleges and denies as follows:

I.

She alleges that, on the 6th day of December, A. D. 1882, S. L. Mastick, theretofore one of the defendants herein, died testate, being at the time of his death a resident of the county of Alameda, State of California; that, on the 6th day of January A. D. 1883, the superior court of said county of Alameda, by its order and judgment then duly given and made admitted the last will and testament of said deceased to probate, and appointed the said Mary W. Mastick the executrix thereof; that letters testamentary thereon were thereupon issued to said Mary W. Mastick, who then became, ever since has been, and now is the duly appointed, qualified, and acting executrix of the last will and testament of said deceased; and that, on the 12th day of December, A. D. 1888, the said Mary W. Mastick, as executrix as aforesaid, was, by the order of this court substituted as a defendant herein in the place of the said S. L. Mastick, deceased.

She denies that the land firstly described in the complaint was, on the eleventh day of March, 1858, or ever at any time, dedicated to public use either as a public square, or for any public use
113 whatever. She denies that it was ever dedicated to public uses by the name of Lafayette park or otherwise, or that the alleged dedication or any dedication thereof or of any part thereof was ever accepted by the public; but, on the contrary, she alleges that said land described in the complaint as Lafayette park is and has been continuously since the year 1850 held and possessed, occupied and claimed as private property by the defendants herein and

others, under and through some of whom the defendants herein claim title to the parts thereof hereinafter particularly described.

She alleges that such possession and occupation last stated, is and has been for all the time stated, adverse to, and inconsistent with all and every right, title and claim of the people of the State or of the public, and that the same has been so possessed, occupied and held in adverse and private ownership.

She admits that said land appears and is laid down on the official map of the city and county of San Francisco as Lafayette park, but she avers that it was so placed and laid down thereon without right and without the consent or authority of the owners of the land, and without any competent authority.

She denies that said so-called public square is valuable for the purposes of such or a public square; but on the contrary, she
114 avers that it is of no value for the purposes of such or a public square, and alleges that said land is valuable only for the private purposes for which it is now used to the exclusion of all public uses thereof whatsoever, and she denies that it was, at the same time with other public squares and plazas in said city and county, or with any public square or plaza therein, or at any time, or in any way whatever, dedicated to public use, or was intended to or would or does add to the comfort, convenience or health of the citizens or residents of said city and county, or of the people of the said State visiting or passing through said city and county, as a public park, square or plaza, or otherwise than as the private property of the defendants herein and others, the private owners and occupants thereof.

She admits that her said testator, S. L. Mastick, upon the lot or parcel by him separately and severally claimed, erected and constructed fences within and upon portions of the premises in the said complaint named as a public square, namely, upon all that portion thereof described as follows, to wit: The lot at the southwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street by one hundred and twenty-seven feet and eight and one-fourth inches on Gough street, and admits that she still continues to maintain such fences thereon, and
115 that it is her purpose to maintain the said improvements and to erect, construct and maintain other permanent improvements on said lands, and that the continuance of the said fences and other improvements on said lands now does, and will exclude the public therefrom, and now does, and in the future will interfere with and hinder and prevent the use thereof by the public as a public square or otherwise; but she denies that the plaintiffs or the public, or any person whatever, will be greatly or in any way injured or prejudiced thereby, or that the said fences or improvements are or will be obstructions or nuisances in any way whatever, and denies that she or her said testator have occupied or possessed, or claimed the right to occupy, hold or improve, or erected or built any fence, house or improvement of any kind upon or within any portion of the lands in the complaint described, except the portion thereof hereinbefore particularly described.

She alleges that the above description includes all the lands claimed by her, and she disclaims any interest in the land included within the limits of Clay street.

II.

And for another, further, and separate answer and defense this defendant alleges: That the plaintiffs ought not to have or maintain this action, for this, viz: that this same matter and all the
116 matters alleged in this complaint touching the land in question have been and were, before the commencement of this suit, fully litigated and finally adjudged, decided and determined against the plaintiffs, and in favor of the defendants herein; and that all and singular the matters in issue and involved in this action, are *res judicatæ*.

And in support thereof, she alleges, that heretofore, to wit: on the 16th day of November, 1863, The People of the State of California, the plaintiffs herein, at the relation of one George T. Bohen, by their attorney general, commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein, against S. W. Holladay (one of the defendants herein), John Doe, Richard Roe and A. P. Anderson, as defendants therein.

That in and by said complaint the plaintiffs therein alleged that this same land had been, prior to November 16th, 1863, lawfully dedicated to and accepted by the public as a public plaza or square, by the name of Lafayette square, and that the defendants therein had actually commenced to erect and construct fences and other permanent improvements upon said square or plaza; wherein said plaintiffs prayed that the defendants therein, their workmen and servants, might be enjoined from further erecting or con-
117 structing thereon any fences or other works or obstructions, and that said defendants might be ordered to remove therefrom all fences or other obstructions placed thereon by said defendants.

Thereupon an injunction issued upon said complaint against said defendants.

The defendants in the said complaint, other than S. W. Holladay, were his workmen, at the time employed by him and at work on the premises, but having no interest therein, and said S. W. Holladay was at the time in the sole and exclusive possession and occupation of said premises and claiming the same in his own right.

That afterwards, to wit: November 27th, 1863, said defendant S. W. Holladay, and the other defendants named in said complaint, appeared in said action and filed their answer thereto, wherein they denied that said land therein mentioned was ever in any manner dedicated to the public or accepted by the public as a public square or otherwise or at all.

And in said answer, said Holladay claimed to be the owner of said land in his own right exclusively, adversely to all the world, and that he and his predecessors in interest therein had held, occupied and claimed said premises continuously from the summer of

the year 1854 down to the time of filing his said answer, to wit: November 27th, 1863.

118 Afterwards, said cause came on regularly for its trial before the court, and the same was fully tried and submitted to the court for decision, and afterwards, to wit: February 19th, 1876, said fourth district court duly gave and made its judgment and decree in said cause, wherein all the matters in issue, and which were tried in said cause were decided and adjudged in favor of the defendants therein, which judgment is in the words and figures following, to wit:

In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex Rel.* GEORGE T. BOHEN, Pl'ffs,
vs.
S. W. HOLLADAY *et als.*, Defendants.

Judgment.

This cause having come on regularly for trial before the court without a jury, a trial by jury having been heretofore expressly waived by the parties in open court, the cause was tried by the court sitting without a jury, and witnesses for the respective

119 parties having been duly sworn and examined and certain documentary evidence having been read in evidence and the cause duly submitted to the court upon briefs of the respective counsel.

And after due consideration thereof, the court having afterwards, on the eleventh day of July, 1864, rendered its decision thereon upon all the issues, against the plaintiff and in favor of the defendants and ordered the injunction theretofore issued in the cause against the defendants to be dissolved, and directed in said order counsel to draw findings.

And the counsel herein having by their stipulation in writing filed herein, expressly waived written findings and consented that judgment be entered without written findings, pursuant to the order and decision of the court.

It is now, therefore, by the consideration of the court, ordered, adjudged and decreed that the plaintiffs take nothing by this action, but that the defendant, Samuel W. Holladay, was at the time of the commencement of this suit, and is in the true and lawful possession as the owner thereof of so much of the land and premises described in the complaint as is claimed and described in his answer as "the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets;" which lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

120 First. On the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

That as to said parcels of land last above described as "First" and "Second," it is adjudged and decreed that the defendant, Samuel W. Holladay, was, from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon; and that the said land never was, nor has been, by the lawful owner or proprietor thereof lawfully, nor in any way dedicated to, accepted or used by the public as a public square or plaza or for any public use, but that the same was all that time and is the private property and in the actual and lawful possession of the defendant Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant, Hazard P. Herrick (who in the complaint is called by the fictitious name of John Doe)
121 and the defendant A. P. Anderson, had not at the time of the commencement of this suit, or at any other time, any right or claim to any of the premises except as servants and workmen under and in the employ of defendent, Holladay.

And it is further adjudged and decreed that the defendant, S. W. Holladay, has not, nor has he had at any time prior to the commencement of this suit, any right or title in or to, or the possession of any part of the premises described in the complaint, consisting of four blocks bounded by Washington, Gough, Sacramento and Laguna streets, except the six fifty-vara lots mentioned in his answer and embraced in the parcels "First" and "Second" hereinabove described.

Feb'y 19th, 1876.

R. F. MORRISON, *Judge.*

Said judgment was duly recorded February 23d, 1876, Book M, page 29 of judgments.

Said judgment has never been appealed from, vacated or reversed, or in any way modified, but the same still remains a final and valid judgment in the premises between said parties and their privies and successors in interest.

The land in controversy in that suit is the same land in controversy in this suit, and no other or different land.

The plaintiffs in that suit are the same plaintiffs as in this suit.

122 The controversy, issues and cause of action in that suit were the same as in this suit, and none other or different.

The defendant S. W. Holladay, named in that suit, is the same S. W. Holladay who is defendant in this suit; who has conveyed the premises in parcels to other parties by deeds of conveyance, duly executed and recorded as hereinafter mentioned under and through which deeds the other defendants claim title and possession of said land.

That after said adjudication, to wit, on the 16th day of July, 1868, the said S. W. Holladay sold and conveyed to this defendant's testator, S. L. Mastick, one parcel of said premises, namely: the lot at the southwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street, by one hundred and twenty-seven feet eight and one-fourth inches on Gough street, for the price and consideration of $4,500 paid therefor; and the deed for which was recorded August 15th, 1868, in Liber 450 of Deeds, in the office of the county recorder of said city and county.

That under and by virtue of his said deed, said S. L. Mastick entered upon this lot so purchased, relying upon his said deed for the same as a title secured and settled by the adjudication aforesaid.

123 III.

And for another, further and separate answer and defense to this action, this defendant alleges: That heretofore, to wit: on the 16th day of November, 1863, the plaintiffs herein, on the relation of one George T. Bohen, by their attorney general, commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (one of the defendants herein), John Doe, Richard Roe and A. P. Anderson as defendants therein.

That the defendants, John Doe, Richard Roe and A. P. Anderson mentioned in said complaint, were employees of the said defendant Holladay, and had not, and did not claim any interest adverse to the plaintiff in said action.

That the defendant Holladay, in said action, on behalf of himself and his codefendants, filed his answer to the complaint therein, and afterwards on the 19th day of February, 1876, the court by its judgment duly given and made, adjudged and decreed that the land in said complaint described never was, nor has been, by the lawful owner or proprietor thereof, lawfully, nor in any way dedicated to or accepted or used by the public as a public square or plaza, or for any public use.

124 That the land described in the complaint in said action was also described in the said judgment and decree, and is the identical land described in the complaint herein.

That the defendants in this action claim title under the said S. W. Holladay, the defendant in the aforesaid action by deraignment of title subsequent in date to the rendition of said judgment.

That said judgment has never been appealed from, vacated, reversed, or in any way modified, but the same still remains a final and valid judgment in the premises between the said parties and their privies and successors in interest.

That the plaintiffs in said action are the same plaintiffs herein, and the defendants in said action are the predecessors in interest of the defendants herein.

IV.

And for another, further and separate answer and defense to this action, this defendant alleges: That the plaintiffs ought not to have or maintain this action for this, viz: that this same matter and all matters in controversy herein, have been and were before the commencement of this action, fully litigated and finally adjudged, decided and determined in favor of the defendant, S. W. Holladay, and against the plaintiffs in that certain action commenced in the district court of the fourth judicial district of the State of
125 California, in and for the city and county of San Francisco, on the 17th day of December, 1864, by the defendant, S. W. Holladay, as plaintiff, against The City and County of San Francisco, a municipal corporation, as defendant.

That at the time said action was brought, and at all times since, all the right, title and interest of plaintiffs, if any they had or have, in and to the premises in the complaint described, was vested in the said city and county of San Francisco, in trust for plaintiffs, as trustee of an express trust.

Said trust arose by the operation of the act of Congress of the United States, approved July 1, 1864, entitled "An act to expedite the settlement of titles to land in the State of California," and plaintiffs have not at any time had any other or different title than the one vested in said city and county by said act of Congress.

That in said action above mentioned, the said city and county of San Francisco filed its answer to said complaint, and put in issue its title to the lands in the complaint herein described.

That whether or not the plaintiffs herein then had or have ever had any right, title or interest in or to the premises described in the complaint herein, depended solely upon whether or not the said city and county of San Francisco had any right, title or interest in said premises.

126 That thereafter such proceedings were had that the said district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, by its judgment duly given and made, adjudged and decreed that said S. W. Holladay, the plaintiff in said action was, at the time said action was brought, the owner in fee-simple absolute of an undivided nineteen*th*-twentieths ($\frac{19}{20}$ths) of the land described in said action and in the complaint herein, as tenant in common with the said defendant The City and County of San Francisco, and the said defendant was the owner as tenant in common with the said S. W. Holladay of an undivided one twentieth ($\frac{1}{20}$th) of the land in the complaint described.

It was further adjudged and decreed in said action that the title of the said S. W. Holladay be, and the same was quieted as against the said city and county of San Francisco, and the said city and county of San Francisco was adjudged to have no right, title or interest therein except the undivided one-twentieth thereof.

Said judgment has never been appealed from, vacated, reversed or in any way modified, but the same still remains a final and valid

judgment in the premises between the said parties and their privies and successors in interest.

That all the defendants in this action claim title under the
127 said S. W. Holladay by virtue of conveyances made by said S. W. Holladay subsequent to the rendition of said judgment.

That said judgment in said action was duly given and made on the 25th day of September, 1867.

That the present action was brought by the authority and direction of, and at the sole instance of The City and County of San Francisco, defendant in the suit last named, and is and has been so conducted and prosecuted by its agents and attorneys, authorized and employed by it, and the costs and expenses of commencing and prosecuting this suit have been and are being paid by said city and county, the real party in interest herein.

V.

And for another, further and separate answer and defense this defendant avers that the land in controversy herein and above described, is within and a part of the land mentioned and described in the grant to the respective possessors thereof, June 20th, 1855, by ordinance No. 822, of the city of San Francisco, ratified and confirmed by an act of the legislature of this State, approved on the 11th of March, 1858, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the city."

That on and prior to January 1st, 1855, Philip W. Shep-
128 heard, C. R. Saunders, and the defendant, S. W. Holladay, claiming as tenants in common, were in the actual possession as tenants in common with each other, of a larger piece of land including the above-mentioned parcels one and two, and their said possession of said land including said two parcels was continued from the summer of the year 1854 without interruption down to and including the year 1860.

That afterwards and prior to the commencement of each and all of the suits before mentioned, the said Shepheard and Saunders by good and sufficient deeds of conveyance, assigned and transferred all their interest in said two parcels of land to the said defendant S. W. Holladay, who thereby became and was the lawful owner, seized and possessed thereof; and afterwards and prior to the commencement of this suit, the defendants herein, other than S. W. Holladay, have by and through good and sufficient deeds of conveyance to them respectively, derived all his right, title and interest in said two parcels of land, and said defendants are in possession of the same, and are the lawful owners thereof.

These defendants and their predecessors in interest therein, have held, occupied and claimed said land, in their own right, continuously from the year 1850 down to the present time.

129 VI.

That plaintiffs ought not to have or maintain this action, and that they ought to be and are in law barred and estopped from the

further prosecution thereof because of the matters and facts following, which these defendants allege to be true, namely:

That The City and County of San Francisco, as plaintiff, on or about October 23d, 1883, brought an action against these defendants in the superior court of this city and county, and by the second and last amended complaint filed May 2d, 1884, alleged that the said city and county was on July 10th, 1878, and still continued to be seized in fee of the lands in dispute in the present action (which are hereinafter described) in trust for the use of the State of California as a public park and for the use of the people of the city and county of San Francisco as a public common or square, and that said plaintiff was entitled to possession of the same; and that said land was on said July 10th, 1878, and at the time of filing said complaint, a public park or square dedicated as such to the people of the State of California and of the city and county of San Francisco; and that these defendants had, on July 10, 1878, wrongfully entered upon said land and ejected plaintiff therefrom; and that defendants were still wrongfully withholding the possession thereof from said plaintiff, and prayed judgment against said defendants for the
130 restitution of said premises, and for $10,000.00, the value of the use and occupation thereof.

That afterwards, to wit: May 2d, 1884, the defendants therein (who are the defendants herein) duly appeared in said action and filed their answer to said second amended complaint wherein they denied each and all the allegations of said complaint; and further, said defendants pleaded various matters in bar and estoppel, of the cause of action therein alleged, and averred that all the matters in issue therein were *res judicatæ;* and further, allege title and possession in defendants.

Thereafter, the cause came on regularly for trial before the court, and was thoroughly tried, litigated and contested in good faith between the parties, and submitted to the court for decision; and thereupon, afterwards, on June 28, 1884, the court duly gave and made its decision in writing on all the issues therein in favor of defendants and against the plaintiff, which decision was filed therein.

Afterwards, to wit: on Dec. 12, 1884, said court duly gave and made its order denying plaintiff's motion for a new trial in said cause.

That after the making and filing of said decision in writing judgment was duly entered thereon, and recorded on July 25, 1885, in Judgment Book 2, page 622, department 7 of said court, whereby it was "ordered, adjudged and decreed that The City and
131 County of San Francisco, plaintiff, do take nothing by this action as against S. W. Holladay, Georgiana C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastick, deceased, and R. G. Davission, defendants; but that judgment be and the same is hereby entered herein in favor of said defendants, and that said defendants do have and recover of and from said plaintiff their costs and disbursements incurred in this action, amounting to the sum of thirty-four $\frac{50}{100}$ ($34.50) dollars."

Said judgment has never been appealed from, reversed or in anywise vacated; but the same has become and is a valid and final judgment.

That on December 23d, 1884, the plaintiff therein appealed to the supreme court of this State from said order of said superior court made on the 12th day of December, 1884, refusing the motion of plaintiff for a new trial therein, and the transcript on appeal was duly filed in said supreme court.

That afterwards, and after this case had been tried in this court and submitted for decision, viz: on April 28, 1888, the supreme court by its order and judgment duly made, affirmed said order denying said motion of said plaintiff for a new trial.

And afterwards, to wit: May 21, 1888, said supreme court duly made its order refusing said appellant's petition for a rehearing.

132 May 29, 1888, the remittitur in said suit came from the supreme court to the said superior court, which was by order of said superior court spread upon the record and noted against the minute of said order appealed from.

And these defendants aver, that the above-mentioned action was instituted, and the same was to the termination thereof, prosecuted and conducted by said city and county in the interest of, and for the use and benefit of the people of this State and as their representative, as well as for said city and county plaintiff therein; whereby these defendants claim that plaintiffs are barred and estopped from maintaining this action.

The land in controversy in said action was in said complaint described as follows, viz:

"Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

"Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street."

Said two parcels of land above described were the whole and only lands in controversy in that suit, and are the whole and only lands in controversy in this suit, and not otherwise.

133 The issues and matters in litigation in said suit and the objects and purposes thereof were the same as those in this present suit.

The defendants in that suit, namely: S. W. Holladay, Georgiana C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastic, deceased, and R. G. Davisson were and are the same as the defendants in this action.

And the dedication of said land in said action is the same dedication alleged in this present suit.

Wherefore, this defendant prays that the complaint be dismissed with costs.

MASTICK, BELCHER & MASTICK,
Attorneys for Defendant Mary W. Mastick, Executrix, etc.

STATE OF CALIFORNIA,
City of Alameda, County of Alameda, } ss:

Mary W. Mastick, being duly sworn, deposes and says that she is the defendant above named; that she has read the foregoing answer and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on information and belief; and that as to those matters she believes it to be true.

MARY W. MASTICK.

Subscribed and sworn to before me this 6th day of April, 1892.

[SEAL.] WILLIAM HOLTZ,
Notary Public.

134 (Endorsed:) "Allowed to be filed this 15 day of April, 1892. J. C. B. Hebbard, judge. Filed Apr. 15, 1892. Wm. J. Blattner, clerk. By J. J. Groom, deputy clerk."

(Title of Court and Cause.)

In Late 15th District Court, No. 10459.

Supplemental Answer.

Now come the defendants Samuel W. Holladay, Georgiana C. O. Holladay and R. G. Davisson, above named, and by leave of the court first had and obtained, make this, their supplemental answer to plaintiffs' complaint, and in that behalf these defendants allege as follows:

That plaintiffs ought not to have or maintain this action, and that they ought to be and are in law barred and estopped from the further prosecution thereof because of the matters and facts following, which these defendants allege to be true, namely:

That The City and County of San Francisco, as plaintiff,
135 on or about October 23d, 1883, brought an action against these defendants in the superior court of this city and county, and by the second and last amended complaint filed May 2d, 1884, alleged that the said city and county was on July 10th, 1878, and still continued to be seized in fee of the lands in dispute in the present action (which are hereinafter described) in trust for the use of the State of California as a public park and for the use of the people of the city and county of San Francisco as a public common or square, and that said plaintiff was entitled to possession of the same; and that said land was, on said July 10th, 1878, and at the time of filing said complaint, a public park or square dedicated as such to the people of the State of California and of the city and county of San Francisco; and that these defendants had, on July 10, 1878, wrongfully entered upon said land and ejected plaintiff therefrom; and that defendants were still wrongfully withholding the possession thereof from said plaintiff, and prayed judgment against said defendants for the restitution of said premises, and for $10,000.00, the value of the use and occupation thereof.

That afterwards, to wit: May 2d, 1884, the defendants therein (who are the defendants herein) duly appeared in said action and filed their answer to said second amended complaint wherein they denied each and all the allegations of said complaint; and
136 further, said defendants pleaded various matters in bar and estoppel of the cause of action therein alleged, and averred that all the matters in issue therein were *res judicata*, and further, alleged title and possession in defendants.

Thereafter the cause came on regularly for trial before the court, and was thoroughly tried, litigated and contested in good faith between the parties, and submitted to the court for decision; and thereupon, on June 28, 1884, the court afterwards duly gave and made its decision in writing on all the issues therein in favor of defendants and against the plaintiff, which was filed therein.

Afterwards, to wit: on Dec. 12, 1884, said court duly gave and made its order denying plaintiffs' motion for a new trial in said cause.

That after the making and filing of said decision in writing, judgment was duly entered thereon and recorded on July 25, 1885, in Judgment Book 2, page 622, department 7 of said court, whereby it was "ordered, adjudged and decreed that The City and County of San Francisco, plaintiff, do take nothing by this action as against S. W. Holladay, Georgiana C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastick, deceased, and R. G. Davisson, defendants; but that judgment be and the same is hereby entered herein, in favor of said defendants, and that said defendants do have and recover of and from said plaintiff their costs and dis-
137 bursements incurred in this action, amounting to the sum of thirty-four $\frac{50}{100}$ ($34.50) dollars."

Said judgment has never been appealed from, reversed or in anywise vacated; but the same has become and is a valid and final judgment.

That on December 23d, 1884, the plaintiff therein appealed to the supreme court of this State from said order of said superior court made on the 12th day of December, 1884, refusing the motion of the plaintiff for a new trial therein, and the transcript on appeal was duly filed in said supreme court.

That afterwards, and after this case had been tried in this court and submitted for decision, viz: on April 28, 1888, the supreme court by its order and judgment duly made, affirmed said order denying said motion of said plaintiff for a new trial.

And afterwards, to wit, May 21, 1888, said supreme court duly made its order refusing said appellant's petition for a rehearing.

May 29, 1888, the remittitur in said suit came from the supreme court to the said superior court, which was by order of said superior court spread upon the record and noted against the minute of said order appealed from.

And these defendants aver, that the above-mentioned, action was instituted, and the same was to the termination thereof,
138 prosecuted and conducted by said city and county in the interest of, and for the use and benefit of the people of this

State and as their representative, as well as for said city and county plaintiff therein; whereby these defendants claim that plaintiffs are barred and estopped from maintaining this action.

The land in controversy in said action was in said complaint described as follows, viz:

"Parcel one: Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

"Parcel two: Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street."

Said two parcels of land above described were the whole and only lands in controversy in that suit, and are the whole and only lands in controversy in this suit, and not otherwise.

The issues and matters in litigation in said suit and the objects and purposes thereof were the same as those in this present suit.

The defendants in that suit, namely: S. W. Holladay, Georgiana C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastick, deceased, and R. G. Davisson were and are the same as the defendants in this suit.

139 And the dedication of said land in said action is the same dedication alleged in this present action.

That the last answer of these defendants in the present action (which was their amended answer), was filed in this court on the 11th day of April, 1888.

Wherefore defendants allege that plaintiffs ought to be held and adjudged to be barred and estopped from the further prosecution of this suit, and they pray that judgment accordingly be awarded in favor of these defendants with costs, and for such other and further relief as may be just.

April 2d, 1892.

S. W. AND E. B. HOLLADAY,
Attorneys for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

S. W. Holladay being sworn, says that he is one of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge. S. W. HOLLADAY.

Subscribed and sworn to, on this 2d day of April, A. D. 1892, before me,

[SEAL.] JNO. F. LYONS,
Notary Public.

140 Service of a copy of the foregoing supplemental answer is admitted this 2d day of April, 1892.

W. H. H. HART,
Att'y Gen'l, Attorney for Plaintiff.

WILLIAM MATTHEWS,
CRAIG & MEREDITH,
Of Counsel.

(Endorsed:) "Allowed to be filed this 15th day of April, 1892. J. C. B. Hebbard, judge." "Filed Apr. 15, 1892. Wm. J. Blattner, clerk, by J. J. Groom, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late 15th Dist. Ct.

Findings.

This cause came on regularly for trial before the court, without a jury, on May 23rd, 1892, when the evidence was introduced, and on August 25th and 31st, 1892, the cause was argued by the respective counsel; the plaintiff appearing by William Matthews and J. H. Meredith, Esqs., and defendants by S. W. and E. B. Holladay and W. C. Belcher, Esqs., and the cause was regularly submitted for decision.

141 And the court having duly considered the law and the evidence, now finds and decides as follows:

As to the Facts.

I.

The land described in the complaint was by section 5 of the act of Congress of July 1st, 1864, to expedite the settlement of titles to lands in the State of California, ratifying the act of the legislature of said State, approved March 11th, 1858, and the ordinances therein recited, dedicated to and accepted by the public as a public park.

I.

That on the 16th day of November, 1863, The People of the State of California (the plaintiff herein) at the relation of George T. Bohen, by their attorney general, commenced an action in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (one of the defendants herein) John Doe, Richard Roe and A. P. Anderson, as defendants therein.

II.

142 That in and by said complaint, plaintiff therein alleged that certain land therein described (and including all the land now claimed by these defendants as described in their answers filed herein,) had been theretofore, that is, prior to November 16th, 1863, by the lawful owner and proprietor thereof, lawfully dedicated to and accepted by the public as a public plaza or square, by the name of "Lafayette square," and that the defendants had actually commenced to erect and construct fences and other permanent improvements directly within and upon said public square or plaza; and said plaintiff prayed that defendants therein, their workmen and servants, might be enjoined from further erecting or

constructing thereon any fences or other works or obstructions, and that they, the said defendants, might be ordered to remove therefrom all fences, or other obstructions placed thereon by said defendants.

III.

That thereupon an injunction issued upon said complaint against said defendants.

IV.

That the defendants in said action last above named, other than S. W. Holladay, were his workmen, at the time employed by him and at work on the premises, but having no interest therein; and said S. W. Holladay was at the time in the sole and exclusive
143 possession and occupation of said premises, and exclusively claiming the same in his own right.

V.

That afterwards, to wit: November 27th, 1863, said defendant S. W. Holladay and the other defendants named in said complaint, appeared in said action and filed their answer thereto, wherein they denied that the land in the complaint mentioned was ever in any manner dedicated to the public or accepted by the public as a public square or otherwise or at all. And in said answer said Holladay claimed to be the owner of certain described land (including a part of the land described in the complaint therein, as Lafayette park, and including the whole of the land now claimed by these defendants in the present action) in his own right, exclusively and adversely to all the world, and that he and his predecessors in interest therein had held, occupied and claimed said premises continuously from the summer of the year 1854 down to the time of filing said answer, to wit: November 27th, 1863.

VI.

That afterwards, said cause came on regularly for trial before the court, and the same was fully tried and submitted to the court for its decision on April 21st, 1864, and thereafter, on the 11th of July, 1864, the court made and entered in its minutes the following order:

144 (Title of Court and Cause.)

"Monday, July 11th, 1864.—This cause heretofore tried by the court sitting without a jury, and submitted for consideration and decision, having been duly considered, it is ordered by the court that a finding be drawn herein in favor of the defendants and against the plaintiff, and that the injunction heretofore issued herein, be and the same is hereby dissolved. Counsel to drawn findings."

And afterwards, to wit: February 18th, 1876, said 4th district court duly gave and made its judgment or decree in said cause

wherein all the issues involved in said cause were decided and adjudged against the plaintiff and in favor of the defendants therein, of which judgment a true copy is set out in the amended answer herein filed April 11th, 1888.

VII.

That said judgment was duly recorded February 23, 1876, in Judgment Book M, page 79, of said 4th district court.

VIII.

That said judgment has never been appealed from, vacated, reversed, or in any way modified.

145 IX.

That the land in controversy in that suit and as described in said judgment is, "the six 50-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets, which lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

"First. On the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street."

"Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street, on the south by Clay street, and on the west by Octavia street;" which land is the same land claimed by these defendants in their answers filed herein.

The plaintiff in that suit is the same plaintiff named in this suit.

The defendant, S. W. Holladay, named in that suit, is the same S. W. Holladay who is defendant in this suit, and who has since conveyed these premises in parcels to the other defendants herein, by deeds of conveyance duly executed and recorded, as stated in their answers herein, under and through which deeds the other defendants claim title and possession of said land.

146 X.

And the court further finds, that prior to the commencement of the present action, to wit: on the 17th day of December, 1864, S. W. Holladay, one of the defendants herein, commenced his action as plaintiff, against The City and County of San Francisco, as defendant, in the 4th district court, in and for said city and county, by filing his complaint in said court, alleging that he was then the owner in fee-simple absolute, and in possession of the land therein described, being the six 50-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets, which lots are situated in the city and county of San Francisco, and otherwise bounded and described as follows:

First. On the north by Clay street, on the east by Gough street,

on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street, on the south by Clay street, and on the west by Octavia street; and alleging that the defendant, said city and county, then claimed or pretended to have some estate, right, title or interest in said land adverse to said plaintiff Holladay, and that said claim was false and
147 groundless and a cloud upon his title to said land, and an injury and prejudice to him, said plaintiff, and that said suit was brought for the purpose of determining such adverse claim against said city and county, defendant, and in favor of said plaintiff, S. W. Holladay, and praying judgment that said defendant have no right, title or interest in said land, and for general relief.

That summons was duly issued on said complaint, which summons was served by the sheriff, together with a certified copy of said complaint on the defendant therein, by delivering the same to H. P. Coon, then mayor of said city and county, December 22, 1864. That afterwards, to wit: on December 31st, 1864, said City and County of San Francisco, defendant, appeared by her attorney and counsellor, John H. Saunders, and filed her answer to said complaint, by which answer said defendant denied each and every of the allegations in said complaint contained.

XI.

That afterwards said cause came on regularly for trial before the court and the same was tried on its merits and submitted to the court for its decision.

XII.

148 That afterwards on September 5th, 1867, said court duly made its decision in writing therein, whereby it found and decided as follows:

"1st. That the land described in the complaint is a part of the land which pertained to the town or pueblo which existed under the laws of Mexico, prior to the year 1846, and which then composed what is the present site of the city and county of San Francisco.

"2nd. That the defendant herein has succeeded through the former corporation, called the city of San Francisco, to all the right, title and interest of the former pueblo or town and city aforesaid, except such interests as have been in the meantime alienated or disposed of by the former pueblo or city, defendant's predecessors.

"3rd. That in the year 1852, the then city of San Francisco (successor in interest to said former pueblo and legal predecessor to the present defendant), in due form presented her petition or claim for confirmation to a certain tract of land, including the premises in question, to the board of land commissioners, organized and acting under the laws of Congress entitled 'An act to ascertain and settle private land claims in the State of California,' approved March 3rd, 1851, wherein said claim was confirmed to said city by said board

of land commissioners, and afterwards, to wit: on the 18th day of May, A. D. 1865, the said claim of said city for confirmation
149 was finally confirmed by the circuit court of the United States for the district of California, the said cause having in the meantime been duly transferred, by and in pursuance of the laws of Congress, to the court last named, which, at the time, was legally invested with jurisdiction to hear and determine the matter of said claim for confirmation.

"4th. That the land described in the complaint is a portion of a larger tract, as existing in the year 1854, and defined and enclosed by substantial fences, bounding it on the north by a line midway between Washington and Clay streets; on the south by a line midway between Clay and Sacramento streets; on the east by what is now Van Ness avenue, and on the west by what is now the east line of Octavia street, comprising in all eighteen fifty-vara lots excluding the street called Clay street, which has since been extended, running east and west through the center of said tract, and other streets, to wit: Franklin and Gough streets, which have since been laid out and run north and south through said tract.

"That during the summer and fall of the year 1854, the plaintiff and Philip W. Shepheard and Charles R. Saunders, his then co-tenants, enclosed said tract, according to the above-mentioned boundaries by a substantial fence of posts and boards, and built several substantial buildings therein, and exclusively claimed,
150 used and occupied said land and the whole thereof, for the purpose of a dwelling place, cultivation and other useful and substantial purposes, which use and occupation have continued by the plaintiff and his co-tenants therein from the year 1854 continuously down to the time of the commencement of this suit.

"5th. That prior to the commencement of this suit, the plaintiff, by regular deeds of conveyance, derived from his said co-tenants, Shepheard and Saunders, all their right, title and interest in and to the land described in the complaint, and the whole thereof, and at the time of the commencement of this suit said plaintiff was in the actual and exclusive possession and occupation of all the land described in the complaint.

"That on or about the 20th day of May, A. D. 1855, an ordinance was introduced into the common council of the city of San Francisco for passage, which afterwards passed and was approved by the mayor of said city, on the 20th day of June, A. D. 1855, which ordinance was thereafter known as and by the number 822. The same was entitled 'Ordinance for the settlement and quieting of the land titles in the city of San Francisco,' which ordinance is found printed in the Statutes of this State for the year 1858, at page 52 and following.

151 "That on the 8th day of August, A. D. 1855, the mayor of said city sent into the common council thereof a written communication, of which the following is a copy:

"MAYOR'S OFFICE, *August 8th*, 1855.

"To the common council.

"GENTLEMEN: By the terms of the ordinance, approved June 20th, 1855, entitled 'An ordinance for the settling and quieting of land titles in the city of San Francisco,' it is provided that a commission, consisting of three persons, shall be chosen by the common council in joint convention, whose duty it shall be to select from the lands within the corporate limits of the city, and lying west of Larkin street and southwest of Johnston street, as many lots as the mayor and common council may, by ordinance, determine necessary for public and municipal purposes, and that said selection shall be made within six months from the passage of the ordinance so approved June 20th, 1855.

"The ordinance also declares that the city shall have the right to proceed to lay out and open streets as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserve the right, etc.

"I would respectfully suggest to the common council the
152 propriety and expediency of adopting at an early moment the necessary measures to ascertain the lines and boundaries of the streets contemplated to be laid out and opened in the as yet unsurveyed portion of the city; and also to determine by ordinance the number and dimensions of the lots to be selected for public and municipal purposes by the commission above referred to, and further to appoint said commission.

"It will be seen that until these preliminary steps are taken by the common council it will be impossible to determine with accuracy which lands are destined for streets and other public uses, and which are to be retained by the proprietors as private domain. In this condition of things improvements in western and southwestern portions of the city will be greatly retarded and the wholesome and general benefits expected to be derived from the passage of the ordinance for the settlement and quieting of land titles within the city will be correspondingly delayed."

JAMES VAN NESS, *Mayor*.

"That afterwards said common council passed an ordinance on the same subject, known as ordinance No. 845, which was approved by the mayor of said city September 27th, A. D. 1855, and is found printed in the volume of statutes above mentioned at page 55, which is hereby referred to as No. 3.

153 "That on the 12th day of November, 1855, the board of aldermen and the board of assistant aldermen, of said city, met in joint convention, for the purpose mentioned in section 1 of said ordinance No. 845, and elected three commissioners as therein provided for, namely, Horace Hawes, Charles H. Gough and Michael Hayes.

"That on the 21st day of December, 1855, ordinance No. 872, having passed by the respective boards, was on that day approved by the mayor, of which the following is a copy:

"SECTION 1. That the commissioners appointed by the common

council, under the provisions of ordinance 822, for the purpose of selecting and setting apart lands for public purposes, west of Larkin street and southwest of Johnston street, be and they are hereby granted until the 30th day of March, 1856, to complete their labors.

"That afterwards ordinance No. 901 passed said common council, and was on the 7th day of April, 1856, approved by the mayor in the language of the last-named ordinance, except extending the time to the 20th day of April, A. D. 1856, for the purposes therein expressed.

"That on the 19th day of April, 1856, a report, signed by two of said commissioners, namely, Michael Hayes and Charles H. Gough, and certified to by John J. Hoff, city surveyor, was made to
154 said common council, of which report the following is a copy.

"*Report of the Commissioners on the Survey of the Western Addition of the City.*

"To the honorable common council of the city of San Francisco.

"GENTLEMEN: The undersigned commissioners appointed to select, under the provisions of ordinance No. 822, lots and squares for school, fire, hospital and other public purposes, in that portion of the city, west of Larkin street and southwest of Johnston street and to lay out the streets therein, beg leave to make the following report:

"Your commissioners, after a patient and thorough examination of the land, have adopted the accompanying plan or map thereof, showing the streets so laid out, and the lots and squares selected for the above public purposes, and recommend its adoption as the official map of the portion of the city above mentioned. Your commissioners found that it was impossible to perform the work assigned them without a partial survey being first made, and as no provision was made by the city for defraying the expenses of such survey, they became responsible for the hire of the chainmen, flagmen and other expenses incidental to the survey, expecting
155 to be reimbursed by subscription which has been partially done. The annexed schedule, marked "A" shows the total amount of their disbursements in making the survey.

"The number of school lots selected is twenty-eight (28); their size, one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half (137½ ft. by 137½ ft.), except those located on the Potrero, which are one hundred feet by two hundred feet (100 by 200 ft.). The number of lots for fire purposes is twenty-five (25); their size, thirty feet by one hundred and thirty-seven and one-half (30 ft. by 137½ ft.) except those located on the Potrero, which are thirty feet by one hundred feet (30 ft. by 100 ft.). Six (6) squares or plazas are selected; size, four (4) blocks; containing about twelve acres each (12 a.) and four (4) squares, size, two (2) blocks, containing about five (5) acres each, and one lot for hospital, size, two (2) blocks. Perhaps more lots and squares have been

selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since, as the city enlarges, so do her wants.

"Ordinance No. 822 gave your commissioners the power to take only the one-twentieth ($\frac{1}{20}$) of the land of any one person for school, fire, hospital and other public purposes.

"In a great many instances they found, in laying out the
156 lots for such purposes, that in order to place them at proper distances from each other, they would fall entirely upon the land of one person, or cover his house or yard; and moreover, in many cases, such persons did not own more than one block. In order, then, to avoid such difficulties, we were forced to locate some of the public lots and squares in places different from those originally designated.

"Your commissioners also made a personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city, whenever called upon; provided, the city would deed to them her right and title to the balance of their claim. The time is passed when it is necessary to support this course by argument. The city has pledged its faith by ordinance No. 822; the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it. Your commissioners would, therefore, recommend the appointment of two or three suitable persons, with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title of the city to all parties in possessian, as contemplated by ordinance No. 822.

"All of which is respectfully submitted.

"April 19th, 1856.

"MICHAEL HAYES.
"C. H. GOUGH.
"JOHN J. HOFF,
"*City Surveyor.*

157 "That the map or plan, referred to in said report is now in the office of the city and county surveyor, and the same bears on its face a certificate signed by said commissioners, of which said certificate the following is a copy:

"*City of San Francisco.*

"For the location and dimensions of the streets to be laid out within the city limits west of Larkin street and southwest of Johnston street, with the lots or grounds selected, or set apart for the several public uses, as hereon designated, made, selected and presented for the approval of the common council, by the undersigned city surveyor and commissioners, under and in pursuance of the provisions of an ordinance of the common council of the city of San Francisco, entitled:

"An ordinance for the settlement and quieting of land titles in

the city of San Francisco, approved June 20th, 1855; and also an ordinance of the said common council, entitled:

"Ordinance providing for selecting and designating public squares and reservations for hospital, fire-engine and school-houses and other public purposes, and for adopting the plan of the streets in the western and southwestern portions of the city, according to the provisions of ordinance No. 822, and confirmatory of said
158 ordinance No. 822," approved September 27th, 1855.

"C. H. GOUGH,
"MICHAEL HAYES,
"HORACE HAWES,
"*Commissioners.*

"JOHN J. HOFF, *City Surveyor.*"

"This report was, on the 21st day of April, A. D. 1856, received and read in the board of assistant aldermen and ordered published, and laid over for further consideration.

"That the names of the streets on the part of said map, west of Larkin, and southwest of Johnston (now Ninth street) streets were not on said map at the time of said report; but the same have since been placed thereon from time to time by the city and county surveyors.

"That the parcels of land intended by said commissioners as public squares are designated on said map by the following titles:

"Alta square, Alamo square, Hamilton square, Jefferson square, Lafayette park, Lobos square; which contain four blocks each, of the size of the adjoining and surrounding blocks, besides the streets intersecting the same.

"That the parcel on said map designated as 'hospital lot,' contains 8.65 acres, and was located upon the then possession of William Hart, and included about seven-eighths ($\frac{7}{8}$) of the parcel of land at the time actually possessed and occupied by him as his permanent homestead.

159 "That the parcels of land mentioned by said commissioners in their report as having been by them selected for other public purposes than said plazas, and the said hospital lot, bear no name or other designation on said map than a shading of color.

"That the land described in the complaint in this action is situated within what is designated on said map as 'Lafayette park,' through the center of which runs Clay street, east and west, and the street now called Octavia street, north and south.

"That said Lafayette park, as laid out on said plan includes one-third of the said tract of land above described, which was from the year 1854 to 1857 in the actual possession of the plaintiff and his then co-tenants, Shepheard and Saunders.

"That on the 5th day of May, 1856, joint resolution No. 532, passed the common council of said city, of which the following is a copy:

"Joint resolution No. 532 relative to receiving objections to the adoption of the plan of the Western addition.

"Resolved, That a special committee of three from each board be appointed, to whom shall be referred the report and accompanying map of the city surveyor and commissioners, and that said committee be instructed to meet daily at the office of the city surveyor, between the hours of three and four p. m., for one
160 week, for the purpose of receiving objections to the recommendations of said surveyor and commissioners, and that said committee shall advertise said meetings, inviting all interested to present themselves and make known their desires, said committee to report at the next regular meeting of the board.

"Passed the common council finally, May 5th, 1856.

"WM. H. STEVENS,
"*Clerk of the Common Council.*

"That on the 15th day of May, A. D. 1856, the committee appointed under said joint resolution, No. 532, made a report to the common council, of which the following is a copy:

"To the honorable common council of the city of San Francisco:

"Your committee appointed to attend at the city surveyor's office, and receive objections to the adoption of the report of the commissioners, appointed to lay off the Western addition, and the plan drawn by the same, beg leave to report:

"That they have attended to this duty, and up to the present time have heard of but three complaints.

"In view of the large number of persons interested, your committee must regard this opposition as entitled to slight regard, and believe the plan meets with the general favor of the people of that part of the city.

161 "They, therefore, recommend that the accompanying ordinance be adopted, which legalizes said plan, and makes provision for its being carried into effect.

"Your committee would further recommend that the city surveyor be instructed to report to the common council the names proposed for the different streets and squares, and that the same be first confirmed, or other names adopted in their place, before they be officially placed on the map.

"C. J. BARTLETT. CHAS. WILSON.
"WM. H. DOW. CHAS. H. CORSER.
"W. GREENE. G. W. BRYANT.

"And the following is a copy of the accompanying ordinance therein referred to, and reported by said committee for adoption:

"An ordinance confirming the report of the commissioners appointed by the common council in pursuance of ordinance No. 845, entitled:

"An ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engine houses and other

public purposes, and for adopting the plan of streets in the western and southwestern portion of the city, according to the provisions of ordinance No. 822 and confirmatory of said ordinance No. 822, passed September 27th, 1855, and authorizing the mayor to execute and deliver and accept and receive deeds in pursuance of the
162 provisions of said ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco, passed June 20th, 1855.'

"SECTION 1. The common council hereby approves the map and plan of streets to be laid out within the city limits west of Larkin street and southwest of Johnston street, presented by said commissioners acting in conjunction with the city surveyor, and approves the selections made by said commissioners of lands and lots for public uses, in pursuance of the eighth section of said ordinance, entitled 'An ordinance for the settlement and quieting of land titles, passed June 20th, 1855.'

"SEC. 2. The streets as represented on said map and plan referred to in the preceding section are hereby located and established as public streets, and the several lots and parcels of land by said commissioners selected as aforesaid are hereby dedicated, set apart and reserved for the several uses as in their said report specified.

"SEC. 3. The mayor is empowered to accept and receive, and cause to be duly recorded the deeds of the city for the said lands and lots, according to section eight of the said ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855, and to exe-
163 cute and deliver in the name of the city of San Francisco, deeds of release and quitclaim to the several possessors entitled thereto, according to the provisions of sec. second of said ordinance.

"SEC. 4. The deeds so executed and delivered shall be signed as well by the grantee or grantees therein named as by the mayor, and the said grantee or grantees declaring his or their assent to the conditions of said ordinance No. 822, referred to in the preceding section, shall, on his or their part release and quitclaim to the city of San Francisco all the rights, privileges and reservations reserved to the city in and by the provisions and conditions of the ordinance last aforesaid.

"SEC. 5. No person shall be entitled to receive a deed under the provision of this ordinance until he shall have paid up all delinquent taxes and assessments levied by the city upon the land released to him, and shall also have executed, acknowledged and paid the expense of recording the deed properly required of him for the lands or lots selected from his possession for public uses under the provisions of the ordinance hereinbefore mentioned.

"SEC. 6. Aldermen
and assistant aldermen
are hereby appointed a joint committee from the board of aldermen and board of assistant aldermen, who are required to render their advice and assistance to the mayor in the execu-
164 tion of his duties under this ordinance, but shall not be required to sign the said deeds."

"That on the 10th day of July, 1856, said common council became extinct by operation of the act approved April 19th, 1856, entitled 'An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof.'

"That in pursuance of the terms of said act, the then justices of the peace in and for the then county of San Francisco, on and after the 1st day of July, A. D. 1856, till the close of that year, assembled from time to time and discharged the duties of a board of supervisors of, in and for the city and county of San Francisco, created by said act of April 10th, 1856.

"That on the 16th day of October, 1856, said justices of the peace assembled as a board of supervisors, adopted and entered on their minutes a preamble and resolution of which the following is a copy:

"Whereas, by an ordinance of the last common council of the city of San Francisco, approved September 27th, 1855, a commission of three persons was created to make reservations for public uses, and to lay out streets in that portion of the then incorporated limits of said city lying west of Larkin and southwest of
165 Johnston streets, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled 'An ordinance for the settlement and quieting of land titles,' with instructions to said commission to report their action in the premises to the common council for its approval.

"And whereas, said commission did discharge the duties assigned to it, and made report thereof as directed, upon which report coming in, the common council provided by joint resolution that a certain number of days should be allowed for all persons having any objections to said report, or any part thereof, to represent the same.

"And whereas, said time expired, and no objections as the board is informed were made; but still the last common council omitted to take any final action on the report of said commission.

"And whereas, the board is advised and believes that it is proper for the public advantage that said report should be taken up and acted upon, so that doubts may be removed in regard to the location of the streets and the places to be set apart for public squares and for the erection of public edifices in the portions of the city above referred to.

"And whereas, express power is given to this board by the 39th section of the act, entitled: 'An act to repeal the several
166 charters of the city of San Francisco to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' to lay out and open new streets within the former corporate limits of the city of San Francisco, and west of Larkin street and southwest of Johnston street, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled: 'An ordinance for the settling and quieting of land titles,' and as this board can see no ob-

jection to the plan known as the Western addition, reported by said committee.

"The board of supervisors of the city and county of San Francisco, do ordain as follows:

"SEC. 1. That the plan or map of the Western addition reported by the commission, created under an ordinance of the last common council of the city of San Francisco, be adopted by this board and be declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city, lying west of Larkin and southwest of Johnston street-.

"Was adopted by the following votes: Ayes—Messrs. Ryan, Chamberlain and Castro. No—E. W. Smith.

"That no other or further action was ever had by any of
167 the municipal authorities of said city, or said city and county, upon the matters above mentioned, except as herein specially stated and recited.

"That on the 11th day of March, A. D. 1858, the act of the legislature of this State, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city,' was approved.

"As conclusions of law from the foregoing facts it is now found and decided by the court:

"That the plaintiff was at the time of the commencement of this suit, and still is, the owner of an undivided nineteen*th*-twentieths ($\frac{19}{20}$) of all and singular the parcels of land described in the complaint, as a tenant in common with the defendant The City and County of San Francisco, the owner of the other undivided one-twentieth part thereof, as a tenant in common therein with the plaintiff Samuel W. Holladay.

"The land and premises described in the complaint, and now hereby referred to, are bounded and described as follows, viz:

"First. Commencing where the southerly line of Clay street intersects the west line of Gough street; thence running westwardly -long the southerly line of Clay street, four hundred and twelve and one-half (412½) feet of the easterly line of Octavia street;
168 thence southerly along the east line of Octavia street one hundred and thirty-seven and one-half (137½) feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly parallel with and midway between Clay and Sacramento streets four hundred and twelve and a half (412½) feet, to the west line of Gough street; thence northwardly along the last-named line one hundred and thirty-seven and one-half (137½) feet, more or less, to the point of beginning.

"Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence northwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, to a point midway between Clay and Wash-

ington streets; thence eastwardly parallel with and midway between Clay and Washington streets, four hundred and twelve and a half (412½) feet to the west line of Gough street; thence southwardly along the last-named line one hundred and thirty-seven and a half (137½) feet to the place of beginning.

"And finally, because of the tenancy in common in the said land existing between said plaintiff and said defendant, it is hereby
169 ordered, adjudged and decreed that the complaint be dismissed with costs.

"E. D. SAWYER,
"*District Judge.*

"Sept. 5, 1867.

"(Endorsed:) Filed this 5th day of September, 1867. Wm. Loewy, clerk, per James E. Ashcom, D. C."

XIII.

And afterwards, said 4th district court duly gave and made its final judgment or decree as finally entered on said findings of fact aforesaid, which judgment was dated and signed September 25th, 1867, and recorded October 3d, 1867, and is in the following words:

(Title of Court and Cause.)

Final Decree to Quiet Title.

"The motion of plaintiff herein to modify the judgment heretofore entered herein so as to conform the same to the decision and findings of fact and of law signed by the judge of this court and filed herein, coming on regularly to be heard on the 17th day of September, 1867, the plaintiff being heard in support of his said motion, and H. M. Hastings, Esq., the city and county attor-
170 ney, being heard in opposition to said motion, and the court having duly considered the premises, it is now therefore hereby ordered, that the order and decree heretofore entered in this cause, dismissing the complaint herein be, and the same is hereby, vacated, and in place of said order and judgment dismissing plaintiff's complaint with costs, the following judgment be and the same is hereby rendered, to wit:

"From the facts and conclusions of law found, decided and signed by the judge of this court, and on file with the record in this cause, it is now hereby

"Ordered, adjudged and decreed that the said plaintiff, Samuel W. Holladay, is the owner in fee-simple absolute of an undivided interest of nineteen-twentieths (19/20) and no more, in and of the land described in the complaint, and the whole thereof as a tenant in common, with the defendant, the municipal corporation The City and County of San Francisco, which is the owner of an undivided one-twentieth (1/20) and no more, in and of the same land as a tenant in common with the plaintiff, and the said parties (plaintiff and defendant) are entitled to the possession of said land in accordance

with their respective interest therein, as above stated, that is to say, $\frac{1}{20}$ thereof in the plaintiff and $\frac{1}{20}$ thereof in the defendant as tenants in common in that proportion—each with the other, and that
171 as to his undivided $\frac{1}{20}$ thereof the title of said plaintiff be quieted as against said defendant who is hereby adjudged to have no right, title or interest therein, and that as to the other or remaining one-twentieth thereof belonging to the defendant, the title thereto be quieted as against the said plaintiff who is hereby adjudged to have no right, title or interest therein.

"The land and premises described in the complaint in this action and hereby referred to, are situated in this city and county of San Francisco, State of California, and the same are bounded and described as follows:

"First. Commencing where the southerly line of Clay street intersects the westerly line of Gough street; thence running westwardly along the southerly line of Clay street 412½ feet to the easterly line of Octavia street; thence southwardly along the last-named line 137½ feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly parallel with and midway between Clay and Sacramento streets 412½ feet to the west line of Gough street; thence northwardly along the last-named line 137½ feet, more or less, to the point of beginning.

"Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street, thence west along the northerly line of Clay street 412½ feet to the easterly line of
172 Octavia street; thence northwardly along the last-named line 137½ feet to a point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay and Washington streets 412½ feet to the west line of Gough street; thence southwardly along the last-named line 137½ feet to the place of beginning.

"And it is further ordered and adjudged that each party pay his own costs herein without recourse as against the other.

"Dated this 25th day of September, A. D. 1867.

"E. D. SAWYER,
"*District Judge.*

"Decree recorded October 3d, A. D. 1867, in Judgment Book 'G,' at page 630.

"Decree (endorsed:) Filed Sept. 26, 1867.

"Judgment-roll filed Oct. 3, 1867.

"WM. LOEWY, *Clerk*,
"By JNO. F. BODEN, *Dep. Clerk.*"

That the land described in said judgment last aforesaid is the same land which is claimed herein by these defendants in their answers filed herein.

XIV.

That the judgment last named has never been appealed from, vacated, or reversed, or in any way modified.

XV.

173 That the land which was involved as the subject-matter of that action is the same land which is the subject-matter of this action, as claimed by the defendants in their answers filed herein. That said Samuel W. Holladay, the plaintiff in that action is the same Samuel W. Holladay who is defendant in this action, and the other defendants herein are his grantees and successors in interest in portions of the premises, through conveyances subsequent thereto.

XVI.

That in said cause (Holladay *v.* San Francisco, to quiet title) the question in issue and litigated was, whether the land here in controversy had ever been dedicated to the public use claimed by the people (plaintiff) in the present action.

XVII.

That said action was defended by the city and county of San Francisco.

XVIII.

That the judgment therein was against the claim of dedication made by said city, being the same claim of dedication made by plaintiff herein.

XIX.

That by reason of said judgment, all the matters of dedication and title involved and in issue herein are *res judicatæ*.

174 XX.

That heretofore, to wit, on or about October 23rd, 1883, The City and County of San Francisco, as plaintiff, brought an action against these defendants in the superior court of this city and county, and by the second amended complaint, filed therein May 2nd, 1884, allege that said city and county was on July 10th, 1878, and still continued to be seized in fee of certain real property therein described as "situated in the city and county of San Francisco, State of California, to wit: Parcel 1. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and, parcel 2, bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street" (being the same land described in and claimed by defendants in their answers filed herein), in trust for the use of the State of California as a public park, and for the use of the people of the city and county of San Francisco, as a public common or square, and that said plaintiff was entitled to the possession of the same; and that said land was on said July 10th, 1878, and at the time of filing said complaint, a

public park or square, dedicated as such to the people of the
175 State of California and of the city and county of San Francisco; and that these defendants had on July 10th, 1878, wrongfully entered upon said land and ejected said plaintiff therefrom, and that defendants were still wrongfully withholding the possession thereof from said plaintiff, and prayed judgment against said defendants for the restitution of said premises, and for $10,000, the value of the use and occupation thereof.

XXI.

That afterwards, to wit: May 2nd, 1884, the defendants therein (who are the same defendants as herein), duly appeared in said action and filed their answer to said second amended complaint.

XXII.

That thereafter, the cause came on regularly for trial before the court upon the said second amended complaint and answer thereto, and was in good faith tried, litigated and contested between the parties, and submitted to the court for decision, and afterwards, on June 28, 1884, the court duly gave and made its findings and decision in writing, wherein and whereby it found the following, to wit:

I.

"All and singular the matters and issues in this action and all the questions of title and dedication involved herein were heretofore and prior to the commencement of this action, heard,
176 tried and finally adjudicated and determined in favor of S. W. Holladay, (one of the defendants herein) and against the plaintiff herein in an action commenced November 16th, 1863, in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, therein numbered 11029, wherein The People of the State of California were plaintiffs, against said S. W. Holladay, (and two others who were his servants only, having no interest in the controversy as defendants.)

II.

"The same land and no other land was the subject-matter of controversy in that action, No. 11029, and in this: that is, the land parcel one and parcel two described in the complaint and answer herein.

III.

"The same title and the same question of dedication to public use and acceptance by the public were litigated and adjudicated in that action as in this action.

IV.

"The former action No. 11029, was commenced at the instance of the plaintiff herein, and the trial thereof was managed and con-

ducted in the interests of said plaintiff and by her attorneys and officers acting on her behalf

177 V.

"All and singular the matters and issues in this action, and all the questions of title and dedication involved herein, were heretofore and prior to the commencement thereof, heard, tried and finally adjudicated and determined in favor of S. W. Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced December 17th, 1864, in said fourth district court, and therein numbered 11963, wherein the said Samuel W. Holladay, was plaintiff and The City and County of San Francisco, defendant.

VI.

"The same land and no other land was the subject-matter of the two actions, that is: the said action, No. 11963, and of the present action, being the land parcel one and parcel two described in the complaint and answered herein.

VII.

"In the last above-named action (No. 11963) it was, on the 25th day of September, 1867, finally adjudicated and decreed by the court respecting said parcels of land, in manner following, that is to say: "It is now hereby ordered, adjudged and decreed that the said plaintiff Samuel W. Holladay is the owner in fee-simple absolute of an undivided interest of nineteen-twentieths ($\frac{19}{20}$)
178 and no more in and of the land described in the complaint and the whole thereof as a tenant in common with the defendant, the municipal corporation The City and County of San Francisco, which is the owner of an undivided one twentieth ($\frac{1}{20}$) and no more, in and of the same land, as tenant in common with the plaintiff; and the said parties (plaintiff and defendant) are entitled to the possession of said land in accordance with their respective interests therein as above stated, that is to say: ($\frac{19}{20}$) thereof in the plaintiff and ($\frac{1}{20}$) thereof in the defendant as tenants in common in that proportion, each with the other, and that as to his undivided $\frac{19}{20}$ thereof the title of said plaintiff be quieted as against the said defendant, and who is hereby adjudged to have no right, title or interest therein, and that as to the other or remaining $\frac{1}{20}$ thereof belonging to the defendant the title thereto be quieted as against the said plaintiff, who is hereby adjudged to have no right, title or interest therein.'

VIII.

"The parties defendant herein other than S. W. Holladay, have, since the final adjudication in said cases numbered 11029 and 11963 respectively, above mentioned, acquired all his right and title
179 to the parcels of land the subject-matter of controversy herein, from him, by conveyance duly executed, acknowledged and

recorded prior to the commencement of this action; the dates and particulars of which conveyances are truly and correctly set forth in their answer.

IX.

"That prior to the commencement of this action, to wit: March 15th, 1878, the plaintiff herein caused to be commenced an action, No. 10459, in the district court of the 15th judicial district of the State of California in and for the city and county of San Francisco wherein The People of the State of California on the relation of A. J. Bryant, the then mayor of said city and county, were plaintiffs, and Samuel W. Holladay, Georgiana C. Ord Holladay, S. L. Mastick and R. G. Davisson were defendants; wherein it was claimed by plaintiffs and denied by defendants that the land in controversy therein and herein was a part of a public square, lawfully dedicated to public uses and that the defendants therein were unlawfully in the possession of the same as trespassers and intruders.

X.

"Said cause was duly transferred to the superior court in and for the city and county of San Francisco. The said action was commenced and the trial thereof was managed and conducted
180 in the interest of the plaintiff herein and by her attorneys and officers on her behalf.

XI.

"That in said action the same land, and none other, was in controversy as in the present action; the same question of title and dedication to public use on the part of plaintiffs therein and claim of title by defendants therein were in issue and controversy and were tried and adjudicated as in the present action; the same parties defendant in that action are the defendants in this action, except that Mary W. Mastick, defendant herein, appears as the executrix of S. L. Mastick, since deceased, who was a defendant in that action.

XII.

"That said superior court, department 5, wherein said action was tried, duly gave and made its judgment therein November 4th, 1881, whereby it was adjudged against the plaintiffs therein and in favor of the defendants therein as follows, namely: 'By the consideration of the court it is hereby ordered, adjudged and decreed that The People of the State of California, the plaintiffs herein, take nothing by this action, but that the defendants herein, Samuel W. Holladay, Georgiana C. Ord Holloway, Seabury L. Mastick and R. G. Davisson, have judgment for their costs.'

181 XIII.

"Subsequently to said judgment the plaintiffs therein duly served and filed their notice of intention to move for a new trial therein,

followed by a statement, pursuant to notice; which statement was duly settled and filed March 30th, 1882.

XIV.

"Afterwards, by the order of said court, duly given and made March 31st, 1882, the plaintiffs' said motion for a new trial in said action was refused.

XV.

"Afterwards, to wit: May 10th, 1882, the plaintiffs in said action duly served and filed their notice of appeal to the supreme court of this State from said judgment and the whole thereof, and also from said order refusing a new trial and denying plaintiffs' said motion therefor. Said action is still pending on said appeal in the supreme court of the State of California and the same has not been therein heard, tried or in any way disposed of.

XVI.

" Plaintiffs never demanded of defendants, and they, the defendants, never refused the plaintiffs the possession of the one-twentieth ($\frac{1}{20}$) of the premises in question. Plaintiffs' attorneys at the
182 trial waived the right to recover herein an undivided one-twentieth ($\frac{1}{20}$) only, but demanded a judgment for the whole or none.

XVII.

" The subject-matter of this suit and of these findings is the two parcels of land in the city and county of San Francisco, State of California, which are respectively bounded and described as follows, namely:

" Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

" Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

I.

"As conclusions of law applicable to the facts of this case, the court finds that the plaintiff is estopped and barred from the prosecution of this action.

" First. By the judgment and decree of the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, in the above-mentioned case, No. 11029, The People of the State of California against S. W. Holladay *et al.*

183 " Second. By the judgment and decree of said fourth district court, in case No. 11963, entitled S. W. Holladay *vs.* The City and County of San Francisco.

II.

"That the defendants are entitled to judgment, that the plaintiff take nothing by this action, and that the defendants do have and recover of and from the plaintiffs their costs.

"Let judgment be entered accordingly.

"Dated this 28th day of June, 1884.

"T. H. REARDEN, *Judge.*"

And thereafter, on August 15th, 1884, the court added the following, by way of amendment to the findings:

"It appearing that certain expressions in the findings herein filed may be held to imply that counsel for plaintiff waived any claim to the one-twentieth undivided interest in the lands in the complaint demanded: Now, therefore, the court and judge directs that said findings be, and the same are hereby, amended so as to preclude any such construction or meaning, and the court therefore expressly finds that neither the city and county attorney or any of the counsels for plaintiff in this present action has made any stipulation waiving any right that the plaintiff may have to
184 recover any of the lands described in the complaint."

XXIII.

And afterwards the court in accordance with such findings, duly gave and made its judgment therein, which was recorded on July 25th, 1885, in Judgment Book 2, page 622, department 7 of said court, whereby it was ordered, adjudged and decreed that The City and County of San Francisco, plaintiff, do take nothing by this action, as against S. W. Holladay, Georgiana C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastick, deceased, and R. G. Davisson, defendants, but that judgment be and the same is hereby entered herein in favor of the said defendants, and that said defendants do have and recover of and from said plaintiff their costs and disbursements incurred in this action, amounting to the sum of $34.50.

XXIV.

That said judgment has never been appealed from, reversed, or in anywise vacated or modified.

XXV.

That the action last above mentioned was instituted and to the termination thereof was prosecuted and conducted by said city and county of San Francisco.

185 XXVI.

That in said action (City and County of San Francisco *vs.* Holladay), the question in issue and litigated was whether the land here in controversy had ever been dedicated to the public use claimed by the people (plaintiff) in the present action; and the judgment therein was against said plaintiff upon that issue.

XXVII.

That by said judgment (in City and County of San Francisco *vs.* Holladay), all the matters in issue and involved herein are *res judicatæ*.

XXVIII.

The land in controversy in this suit is situated in the city and county of San Francisco and is described as follows, to wit:

First. Commencing at the corner formed by the junction of the southerly line of Clay street with the westerly line of Gough street; thence running westerly along the southerly line of Clay street four hundred and twelve and one-half (412½) feet to the easterly line of Octavia street; thence southerly along the last-named line to a point midway between the lines of Clay and Sacramento streets; thence easterly parallel with and midway between Clay and Sacramento streets four hundred and twelve and one-half (412½)
186 feet to the west line of Gough street; thence northerly along the last-named line to the place of beginning.

Second. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence westerly along the north line of Clay street four hundred and twelve and one-half (412½) feet to the east line of Octavia street; thence northerly along the last-named line to a point midway between the lines of Clay and Washington streets; thence easterly and parallel with and midway between Clay and Washington streets four hundred and twelve and one-half (412½) feet to the west line of Gough street; thence southerly along the last-named line to the place of beginning. Being the same land included in and affected by the judgments in both of the aforesaid actions Holladay *vs.* San Francisco and San Francisco *vs.* Holladay respectively; and being the same land described in the judgment in the case The People of the State *ex rel.* George T. Bohen *vs.* S. W. Holladay first aforesaid.

The land in controversy in this action forms a part of the tract of land laid down on the official map of the city of San Francisco as Lafayette park.

187 As conclusions of law the court finds:

I.

That the before-mentioned action of Holladay *vs.* The City and County of San Francisco, was defended by the city and county of San Francisco for the use and benefit of the people of the State of California, as well as on its own behalf.

II.

That the judgment in said last-named action, is, as a plea a bar, and as evidence conclusive against the claim of plaintiff herein as to an undivided nineteen-twentieths ($\frac{19}{20}$) of the land in dispute in this action, and by reason thereof plaintiff is not entitled to the relief demanded in the present action.

III.

That the aforesaid action of The City and County of San Francisco *vs.* Holladay was instituted, and to the termination thereof was prosecuted and conducted by said city and county of San Francisco in the interest of and for the use and benefit of the people of the State of California, and as their representative, as well as for said City and County of San Francisco, plaintiff therein.

IV.

That the judgment in the last-named action (San Fran-
188 cisco *vs.* Holladay) is, as a plea a bar, and as evidence conclusive against the entire claim of dedication made by the plaintiff in the present action, and as to all the land involved herein.

V.

That by reason of such judgments, this court is precluded from again inquiring into the question or claim of dedication to public use, made by the plaintiff in this action.

VI.

That the plaintiff (The People of the State of California) is barred and estopped from setting up the claim of dedication to public use, against these defendants, of the lands involved in this action; and estopped from denying that defendants are the owners of the lands in fee-simple absolute, and entitled to the possession thereof.

VII.

That all the matters and questions in issue and involved in this action are *res judicatæ*.

VIII.

That the plaintiff, The People of the State of California, cannot maintain this action.

IX.

That the plaintiff herein, The People of the State of Cali-
189 fornia, take nothing by this action, but that judgment be entered herein in favor of defendants for their costs. That the title which passed to the city and county of San Francisco by the act of Congress of July 1, 1864, was unaffected by the judgment in the case of The People *ex rel.* Bohen *vs.* Holladay, pleaded in bar herein.

Dated January 23d, 1893.

J. C. B. HEBBARD, *Judge.*

(Endorsed:) "Filed Jan'y 23, 1893. M. C. Haley, clerk, by J. D. Ruggles, deputy clerk."

(Title of Court and Cause.)

Department 4, J. C. B. Hebbard, judge.

No. 10459. In Late 15th District Court.

Judgment.

The decision of the court in writing in the above entitled and numbered cause, having been duly made, signed and filed on January 23d, 1893, wherein judgment for the defendants herein was ordered to be entered against the plaintiff The People of the State of California on the relation of Andrew J. Bryant, with costs of suit:

Now, therefore, by reason of the law and the evidence in
190 said cause, and of the said decision in writing filed as aforesaid, it is hereby ordered, adjudged and decreed that said plaintiff take nothing by this action; but that the defendants herein, namely, Samuel W. Holladay, Georgiana C. Ord Holladay, Mary W. Mastick, as executrix of the last will of Seabury L. Mastick, deceased, and R. G. Davisson, do have and recover of said plaintiff The People of the State of California, their, the said defendants' costs in this action hereby taxed at the sum of $80.00.

Judgment recorded Jan. 26th, 1893, B. 19, p. 148.

(Endorsed:) "Filed Jan'y 25th, 1893. M. C. Haley, clerk, by D. J. Gordon, deputy clerk."

(Title of Court and Cause.)

Certificate to Judgment-roll.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, M. C. Haley, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in Judgment Book 19 of said court, at page 148. And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

191 Witness my hand and seal of said superior court this 26th day of Jan., A. D. 1893.

M. C. HALEY, *Clerk*,
By WM. RING,
Deputy Clerk.

[SEAL.]

(Endorsed:) "Filed Jan. 26th, 1893. M. C. Haley, clerk, by Wm. Ring, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late 15th Dist. Ct.

Notice of Intention to Move for a New Trial.

To all the defendants in this action and Messrs. S. W. and E. B. Holladay, Messrs. Mastick, Belch-r and Mastick, their attorneys:

You will please take notice, that the plaintiffs in this action intend to move the court to vacate its decision herein, and grant a new trial for the following causes, materially affecting the substantial rights of the plaintiffs.

Said motion will be made upon the grounds following, viz:

First. The evidence is insufficient to justify the decision.

Second. Said decision is against law.

Third. Errors in law *occur* occurring at the trial, and excepted to by the plaintiffs.

192 Said motion will be upon a statement of the cause.

W. H. H. HART,
Att'y General.
WILLIAM MATTHEWS,
CRAIG & MEREDITH,
Att'ys for Plaintiffs.

(Endorsed:) "Service of copy of within notice admitted this 1st day of February, 1893. S. W. and E. B. Holladay, att'ys for def'ts. Filed Feb'y 1st, 1893. M. C. Haley, clerk, by W. T. Hawley, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late U. S. Dist. Court.

Admission of Service of Notice of Intention to Move for a New Trial.

Service is hereby admitted of a copy of the notice of intention to move for a new trial herein.

February 1st, 1893.

MASTICK, BELCHER & MASTICK,
Attorneys for Certain Def'ts.

(Endorsed:) "Filed May 1, 1893. M. C. Haley, clerk, by D. J. Gordon, deputy clerk."

193 (Title of Court and Cause.)

No. 10459. Late 15th District Court.

Plaintiffs' Statement on Motion for a New Trial.

Be it remembered that this cause having been brought on regularly for trial before the court without a jury, a jury having been waived by the parties, and the respective parties having appeared

by their respective attorneys, the following proceedings were had, viz:

The plaintiffs to maintain the issues on their part put in evidence the following testimony, viz:

First.

The act of the legislature of the State of California, approved April 15th, 1851, entitled An act to incorporate the city of San Francisco, and found in the Statutes of California, of the year 1851, pages 357–375, inclusive, the second section of which is as follows:

"The city of San Francisco shall hereafter be bounded as follows: On the south by a line parallel with Clay street, two and a half miles distant, in a southerly direction, from the center of Portsmouth square; on the west by a line parallel with
194 Kearny street, two miles distant, in a westerly direction, from the center of Portsmouth square. Its northern and eastern boundaries shall be coincident with those of the county of San Francisco."

Second.

The petition to the board of commissioners to ascertain and settle private land claims in the State of California, organized under the act of Congress, approved March 3, 1851, by the city of San Francisco, filed before the board July 2d, 1852, which is as follows:

"To the honorable the board of commissioners to ascertain and settle private land claims in the State of California:

"The petition of the city of San Francisco, a municipal corporation of said State of California, respectfully shows:

"That the said city claims a tract or parcel of land, situate in the county of San Francisco, and State aforesaid, and being so much of the peninsula wherein the said city is located as will contain an area equal to four leagues square, said parcel or tract being bounded on the north and east by the waters of the bay of San Francisco, on the west by the Pacific ocean, on the south by a due east and west line, including the area aforesaid.

195 "In pursuance of the laws, usages and customs of the government of Mexico, and an act of the departmental legislature of California, of Nov. 9th, 1833, and proceedings in pursuance thereof, the pueblo of San Francisco was duly erected and constituted a municipal corporation, with a municipal government, and with all the rights, properties and privileges of pueblos under the then existing laws during the said year 1833, and there was then and there, by the supreme government of Mexico, in the manner by law prescribed, ceded and granted to the said pueblo, for town land and for common land, all and singular the premises herein first described. The said pueblo continued and was the proprietor of all and singular the said premises (except so much thereof as has been granted by the authorities of said pueblo in pursuance of law), and the said pueblo continued its existence as such municipality and proprietor until and after the accession of the Government of

the United States, July 7th, 1846, and until, by an act of the legislature of the State of California, entitled 'An act to incorporate the city of San Francisco,' the inhabitants and property of said pueblo are incorporated into a city, which city is now here exhibiting her claims to the premises aforesaid. The said act of the legislature of the State of California is prayed to be taken and read as part
196 of this petition. The same act was modified and changed by an act of the same legislature, passed A. D. 1851, which is also asked to be taken and read as a part of this petition.

"On the 7th of July, 1846, the then pueblo, now city of San Francisco, was a town of the population of about one thousand inhabitants; and on the third of March, A. D. 1851, the population thereof amounted to about thirty thousand persons; and that on said seventh of July and on said third of March, the said pueblo and city, under and by virtue of the grant aforesaid, and under and by virtue of the laws, usages and customs of the government of Mexico and California, all and singular the premises aforesaid (except as aforesaid) were part and parcel of the land and premises of said pueblo and city.

"There are several adverse claims to the one herein set forth.

"One Don de Jesus Noé claims one square league, part of said premises, as particularly appears in his petition therefor now before your board, numbered seventeen on the docket of claims. That Carman Sibrian de Bernal and José Cornelio Bernal claim one square league, part of said premises, which claim is more particularly exhibited in their petition therefor before your board, numbered thirty on the docket of claims. That Jacob P. Leese
197 and Salvador Vallejo claim two hundred varas square, part of said premises, which claim is particularly exhibited in their petition therefor before your board, numbered seventy-four on the docket of claims.

"That James R. Bolton claims three square leagues (with exceptions), part of said premises, which claim particularly appears in his petition before your honorable board, and numbered eighty-one, according to the docket of claims.

"That Josefa de Haro and others claim the 'Potrero de San Francisco,' being one-half square league, part of said premises, the particulars whereof appear in their claim before your board, numbered 101 in the docket of claims.

"That John F. Schulthess and others claim thirty-seven fifty-vara lots, part of said premises, particularly described in his petition on file with your board, and numbered 171 according to docket of claims. That the said John F. Schulthess also claims forty-seven other fifty-vara lots, part of said premises, particularly described in his petition before your board, and numbered 182 of claims.

"That Josefa de Haro and others claim premises known as the 'Laguna de la Merced,' one league long and one-half league wide, and particularly described in their petition before your board,
198 numbering 102 of claims, and which is also part of premises herein first described.

"That one Thomas O. Larkin claims a tract of land parcel of said

premises, and including a portion of the incorporated limits of the city of San Francisco to the west, and running thence westerly along the waters of the bay to the Pacific ocean, including the site of the presidio; the quantity or particular description of his claim this claimant is unable to state.

"That Charles V. Stuart and Isaac N. Thorn claim a portion of said premises known as Ridley's ranch, under a grant to Jacob P. Leese, of one league and one-half, situate contiguous to and north of the Sanchez ranch, but a particular description thereof cannot be given by claimant.

"The claimant represents to your honorable board that all and singular the foregoing adverse claims are insufficient and void; that all of them were made subsequent to the establishment of the pueblo of San Francisco, and that the grants therefor were in derogation of the lawful claim and right of the said pueblo. That some of them were made after the authority of the government of Mexico in the department of California had been suspended by the authority of the Government of the United States; that such is the fact particularly in the case of the land claimed by James
199 R. Bolton, as aforesaid, and in the case of the lands claimed by Thomas O. Larkin, as aforesaid, and also in the case of the land claimed as aforesaid by John F. Schulthess and others, and by John F. Schulthess.

"That all of said claims are based upon grants made without authority of law, and in direct violation of the laws and regulations of the government of Mexico in force in California.

"The said city of San Francisco now insists that by the treaty of Guadalupe Hidalgo, the laws of nations and the laws, usage and custom of the government of Mexico in force in California, as also by force of the act of the legislature of said State incorporating the said city, and the act of Congress of the United States, entitled 'An act to settle the private land claims in the State of California,' approved March 3, 1851, the said city has good and lawful claim to all and singular of the premises as aforesaid, and the said city relies upon the said laws, usages and customs and proceedings in pursuance thereof, upon the order made for the establishment of the pueblo of San Francisco, the record and other evidences of its existence, continuance and extent, the grant to said pueblo as aforesaid, and upon such other evidence as may be adduced touch-
200 ing the premises upon a full exhibition and consideration of all which premises it is prayed that such claim be confirmed.

"J. A. McDOUGALL,
"*For the City of San Francisco.*"

Third.

The decree of the board of land commissioners, filed in their office December 21, 1854 (Exhibit No. 2), in the words and figures following, viz:

United States Land Commissson for California.

Decree of Confirmation. Filed December 21, 1854.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made is that known by the name of the pueblo lands of San Francisco, and is bounded as follows:

Beginning at the little cove to the east of the fort and running across to the beach, so as to leave the fort and casamata to the north; thence running along the beach to Point Lobos on
201 its southern part; thence a straight line to the summit of the Devisadero, continuing said line to the east as far as the Punta del Rincon, including the Canutales and El Gentil, the said line will terminate within the bay of the mission of Dolores, the estuary of which will form a natural boundary between the municipal jurisdiction of that pueblo and the said mission of Dolores; thence along the shore of the bay of San Francisco, as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor José Figueroa to General Mariana G. Vallejo, dated Monterey, November 4, 1834, marked Exhibit No. 18, to the deposition of M. G. Vallejo, taken in No. 280 H. I. T., and now on file among the papers in the case.

ALPHEUS FELCH.
R. AUG. THOMPSON.
S. B. FARWELL.

Which decree was filed Dec. 21st, 1854.

Fourth.

The notice of appeal by Caleb Cushing, attorney general, from decision of commissioners. Transcript filed with the attorney general, March 29, 1856 (endorsed No. 427, U. S. dist. court. Filed June 2, 1856), in the words and figures following:

202 Appeal of the United States from the decree of the United States land commission confirming certain pueblo lands in said city, which notice of appeal was filed June 2nd, 1856.

OFFICE OF THE ATTORNEY GENERAL
OF THE UNITED STATES,
WASHINGTON, 15*th April*, 1856.

"Pueblo lands."

City of San Francisco, claimant:

You will please take notice that in the above case decided by the commissioners to ascertain and settle private land claims in the State of California in favor of the claimant and a transcript of the proceedings in which was received in this office on the 29th day of March, 1856; the appeal in the district court of the United States for the northern district of California will be prosecuted by the United States.

C. CUSHING,
Attorney General.

JOHN A. MONROE, ESQ.,
Clerk U. S. D. C.

Fifth.

The order of transfer of cause to U. S. circuit court in accordance with act of Congress of July 1st, 1864, which order is as follows:

203 Order transferring the case of The City of San Francisco *vs.* The United States from the district court of the United States for the northern district of California to the circuit court of the United States for the same district.

At a stated term of the district court of the United States of America, for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the fifth day of September, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Ogden Hoffman, district judge.

THE UNITED STATES
vs.
THE CITY OF SAN FRANCISCO. } No. 427.

It appearing to the court that, by an act of the Congress of the United States, approved July 1st, 1864, the above-entitled cause, now pending under the act of March 3rd, 1851, may be transferred to the circuit court of the United States for California, order that said cause be, and hereby is, transferred to the circuit court.

OGDEN HOFFMAN,
District Judge.

Sixth.

204 The final decree of the U. S. circuit court, confirming the claim of the city, dated May 18th, 1865, which is as follows:

Final Decree Confirming the Claim of the City of San Francisco to Its Pueblo Lands. Entered May 18th, 1865.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case taken by the petitioner, The City of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the State of California, entered on the 21st day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the northern district of California pending said appeal—the said case having been transferred to this court by order of the said district court, under the provisions of section four of the act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864,—and counsel of the United States
205 and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed that the claim of the petitioner, The City of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

The land of which confirmation is made is a tract situated within the county of San Francisco and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of lands as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming thereunder, by said tribunals, in proceeding now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four
206 square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any

residue, in trust for the use and benefit of the inhabitants of the city.

FIELD,
Circuit Judge.

San Francisco, May 18th, 1865.

Seventh.

The act of Congress of July 1st, 1864, being an act to expedite the settlement of titles to lands in the State of California, the fifth section of that act is as follows:

SEC. 5. And be it further enacted, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California, on the 15th of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the 11th of March, eighteen hundred and fifty-eight, entitled "An act concerning the city of San
207 Francisco, and to ratify and confirm certain ordinances of the common council of the city," there being excepted from this relinquishment and grant all sites or other parcels of land which have been, or now are, occupied by the United States for military, naval or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office, by the surveyor general, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys; and provided that the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico or the laws of the United States, nor preclude a judicial examination and adjustment thereof.

Eighth.

The act of the legislature of the State of California, approved March 11, 1858, known commonly as the act confirming the Van Ness ordinance, Statutes of California for 1858, p. 52 *et seq.*, and which is as follows:

208 An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city. Approved March 11th, 1858.

The people of the State of California, represented in the senate and assembly, do enact as follows:

SEC. 1. Whereas, the common council of the city of San Francisco passed an ordinance, approved by the mayor on the twentieth day of June, A. D. one thousand eight hundred and fifty-five, which ordinance is in the words and figures following, to wit:

Number eight hundred and twenty-two. Ordinance for the settlement and quieting of the land titles in the city of San Francisco.

The people of the city of San Francisco do ordain as follows:

§ 1. It shall be the duty of the mayor to enter at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April fif-
209 teenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit and behoof of the occupants or possessors thereof, according to their respective interests.

§ 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns forever; excepting the property known as the slip property, and bounded on the north by Clay St., on the west by Davis St., on the south by Sacramento St., on the east by the water front. And excepting also any piece or parcel of land situated south, east or north of the water-lot front of the city of San Francisco, as established by an act of the legislature of March 26th, A. D. one thousand eight hundred and fifty-one; provided, such possession has been continued up to the time of the introduction of this ordinance in the common council, or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in
210 possession of the landlord or lessor under whom they were so occupied or possessed; provided, that all persons who hold title to lands within said limits, by virtue of any grant made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo of San Francisco, before the seventh day of July, one thousand eight hundred and forty-six, or grants to lots of land lying east of Larkin street and northeast of Johnson street, made by any ayuntamiento, town council or alcalde of said pueblo since that date, and before the incorporation of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered, or recorded, in a proper book of record deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, one thousand eight hundred and fifty-five, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual

occupancy of persons holding the same adverse to the said grantees.

211 § 3. The patent issued, or any grant made, by the United States to the city, shall inure to the several use, benefit and behoof of the said possessors, their heirs and assigns mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them, individually and by name.

§ 4. The city, however, as a consideration annexed to the next two preceding sections reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets and sites for school-houses, city hall and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding section.

§ 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation; and to assess, in the manner provided by the present or any existing charter of the city, upon the lands bounded on such streets, the whole expense of laying out, opening, grading and construct-

212 ing the same; and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance.

§ 6. The city shall also have the right to select and set apart from the lands west of Larkin street and southwest of Johnston street as many lots, not exceeding one hundred and thirty-seven and a half feet square each, as the mayor and common council may by ordinance determine to be necessary for sites for school-houses, hospitals, fire-engine houses and other public establishments necessary and proper for the use of the corporation; and may lay out and reserve upon the said lands, at convenient and suitable points and distances, public squares which shall not embrace more than one block corresponding in size to the adjoining blocks; provided, that the selection shall be made within six months from the time of the passage of this ordinance, and that the city shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person; and that such possessor shall voluntarily assent thereto; or, refusing to do so, shall not be entitled to the benefit of any concession contained in the second and third sections of this ordinance.

213 § 7. The lots and land reserved for the use of the corporation, under the provisions of the next preceding section, shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in the possession of the respective occupants as to make the apportionment as nearly equal as circumstances will admit.

§ 8. The selection of said lands and lots shall be made by a commission to consist of three persons, who shall be chosen by the common council, in joint convention, who shall report the same to the common council for its approval; and upon such approval deeds of release to the corporation for the lands thus selected shall be executed, acknowledged and recorded, in which deed shall be specified the uses for which they are granted, reserved, and set apart respectively.

§ 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any other outstanding title to the said lands adverse to said possessors.

§ 10. Application shall be made to the legislature to confirm and ratify this ordinance, and to Congress to relinquish all the
214 right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

§ 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States land commission for pueblo lands for the several use, benefit and behoof of the said possessors mentioned in section two, as to the lands by them so possessed, and for the proper use, benefit and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

§ 12. That all ordinances or parts of ordinances conflicting with this ordinance or any of its provisions be and the same *is* hereby repealed.

Approved June twentieth, one thousand eight hundred and fifty-five.

S. P. WEBB, *Mayor.*

And whereas, the said common council passed another ordinance, approved by the mayor of said city, September twenty-seventh, A. D. one thousand eight hundred and fifty-five, which last-mentioned ordinance is in the words and figures following, to wit:

Number eight hundred and forty-five. Ordinance providing
215 for selecting and designating public squares and reservations for hospitals, fire-engines, and school purposes and for adopting the plan of streets in the western and southwestern portion of the city according to the provisions of ordinance number eight hundred and twenty-two and confirmatory of said ordinance number eight hundred and twenty-two.

The people of the city of San Francisco do ordain as follows:

§ 1. Under and by virtue of the provisions of an ordinance of the common council, number eight hundred and twenty-two, entitled "An ordinance for the settling and quieting of land titles in the city of San Francisco, approved June twentieth, one thousand eight hundred and fifty-five." The board of aldermen and board of as-

sistant aldermen shall meet in joint convention at their next regular meeting after the passage of this ordinance and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section eight of said ordinance number eight hundred and twenty-two.

§ 2. It shall be the duty of the city surveyor, acting in conjunction with said commissioners, and with their concurrence, to furnish, by way of recommendation, to the common council, within
216 one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the city limits, west of Larkin and southwest of Johnston streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city under the provisions of the aforesaid ordinance number eight hundred and twenty-two; provided, that the compensation of said commissioners shall not exceed the sum of one hundred dollars each, payable when the common council may legally make an appropriation therefor.

§ 3. The said ordinance number eight hundred and twenty-two, referred to in the preceding section one, is hereby reordained, ratified and confirmed in all its parts.

Approved September twenty-seventh, one thousand eight hundred and fifty-five.

JAMES VAN NESS, *Mayor.*

And whereas, in pursuance of the aforesaid ordinances, commissioners were appointed by the common council, who, in conjunction with the city surveyor of said city, agreed upon and reported for the approval of the common council, a plan for the location of streets, public squares and lots for public uses, to be laid out west of
217 Larkin and southwest of Johnston streets, in said city, accompanied by a map of the same, which said plan and map was by the justices of the peace, exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved and ratified by an order bearing date the sixteenth day of October, A. D. one thousand eight hundred and fifty-six, which is in the words and figures following, to wit:

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the Western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board and be declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets.

Be it therefore enacted, That the within and before recited order and ordinance be and the same are hereby ratified and confirmed, and all the land entered or to be entered in the United States land office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have

been immediately vested in the occupants thereof, for their
218 several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress, entitled "An act for the relief of citizens of towns upon the public lands of the United States, under certain circumstances," approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;" approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually to all intents and purposes as if they were public acts of the State legislature.

§ 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited, shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or
219 other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; provided, that nothing in this act shall be so construed as to release the city of San Francisco or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city or city and county; nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco.

Ninth.

The ordinance of the common council of the city of San Francisco, known as the Van Ness ordinance (No. 822), and which is correctly set out in the first section of the said act of the legislature of California, approved March 11th, 1858.

Tenth.

Ordinance 845. Which is mentioned and correctly set out in the said act of the said legislature of California, approved March 11th, 1858.

Eleventh.

Minutes of board of aldermen, No. 8, November 12th, 1855, showing election of commissioners under the Van Ness ordi-
220 nance, Messrs. Horace Hawes, Michael Hayes and C. H. Gough, in the words as follows:

Appointment of Commissioners to Select Lands for the City under the Van Ness Ordinance.

SAN FRANCISCO, *November 12th*, 1855.

Board of aldermen.

Assistant Alderman Dow and Beideman appeared as a committee from the board of assistant aldermen, proposing to go into joint convention to elect three persons to fill the office of commissioners, created by section one of ordinance 845.

Proposition accepted, and the board adjourned to the room of the assistants.

Joint convention.

Present: Alderman Hopkins, Hathway, Tewksburry, Green and Slocomb.

Assistant Alderman Wilson, Tobin, Peckham, Vandewater, Dow, Beideman and Wells.

Nominations being in order, the following persons were named, viz: H. Hawes, M. Hayes, C. H. Gough, C. D. Carter, W. P. Jones, L. McLane, Jr., and R. H. Sinton. On proceeding to ballot the result was as follows, viz: H. Hawes, 8 votes; W. P. Jones, 5 votes; L. McLane, Jr., 3 votes; M. Hayes, 7 votes; C. D. Carter, 3 votes; C. H. Gough, 7 votes; R. H. Sinton, 3 votes.

221 Messrs. Hawes, Hayes and Gough, having received the highest number of votes, were declared elected.

There being no other business, the convention dissolved, and the board of aldermen withdrew.

Twelfth.

Ordinance 872, in words and figures as follows:

Extending the time for the commissioners appointed by section 8 of ordinance No. 822, to complete their labor.

The people of the city of San Francisco do ordain as follows:

SEC. 1. That the commissioners appointed by the common council, under the provisions of the ordinance 822, for the purpose of selecting and setting apart lands for public purposes west of Larkin and southwest of Johnston streets, be and they are hereby granted until the twentieth day of March, 1856, to complete their labors.

HENRY J. WELLS,
President Board of Assistant Aldermen.
R. W. SLOCOMB,
President Board of Aldermen.

Approved December 21st, 1855.

JAMES VAN NESS, *Mayor.*

Thirteenth.

Ordinance in the following words and figures:

222 *Ordinance* 901.

Extending the time for the commissioners appointed by section 8 of ordinance 822 to complete their labors.

The people of the city of San Francisco do ordain as follows:

SEC. 1. That the commissioners appointed by the common council under the provisions of the ordinance No. 822, for the purpose of selecting and setting apart lands for public purposes west of Larkin and southwest of Johnston streets, be, and they are hereby granted until the twentieth day of April, 1856, to complete their labors.

HENRY J. WELLS,
President of the Board of Assistant Aldermen.
J. M. TEWKSBURY,
President of the Board of Aldermen.

Approved April 7th, 1856.

JAMES VAN NESS, *Mayor.*

Fourteenth.

Also the preamble and order of the board of justices of peace, acting as a board of supervisors, adopting the Van Ness map, passed October 16th, 1856, of which the following is a copy:

Whereas, by an ordinance of the last common council of the city of San Francisco, approved September 27th, 1855, a commis-
223 sion of the three persons was created to make reservations for public uses, and to lay out streets in that portion of the then incorporated limits of the said city lying west of Larkin and southwest of Johnston streets, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled "An ordinance for the settlement and quieting of land titles," with instructions to said commission to report their action in the premises to the common council for its approval.

And whereas, said commission did discharge the duties assigned to it and made report thereof as directed, upon which report coming in the common council provided by joint resolution that a certain number of days should be allowed for all persons having any objections to said report, or any part thereof, to represent the same.

And whereas, said time expired and no objections, as the board is informed, were made, but still the last common council omitted to take any final action in the report of said commission.

And whereas, the board is advised and believes that it is proper for the public advantage that said report should be taken up and acted upon, so that doubts may be removed in regard to the
224 location of the streets and the places to be set apart for public squares and for the erection of public edifices in the portion of the city above referred to.

And whereas, express power is given to this board by the 39th section of the act, entitled "An act to repeal the several charters of, the city of San Francisco, to establish the boundaries of the city and

county of San Francisco, and to consolidate the government thereof," to lay out and open new streets within the former corporate limits of the city of San Francisco, and west of Larkin street and southwest of Johnston street, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled "An ordinance for the settling and quieting of land titles," and as this board can see no objection to the plan known as the Western addition reported by said committee.

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the Western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this
225 board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets.

Fifteenth.

Report of the surveyor and board of commissioners appointed in pursuance of ordinance 845, hereinbefore set forth, made to the board of assistant aldermen, published April 19th, 1856, which is as follows:

Report to the common council by the commissioners appointed as before to select lands for the city under the provisions of the Van Ness ordinance, April 19th, 1856.

The following is the report of the surveyor and board of commissioners made to the board of assistants, and published in the official papers at the time, April 19th, 1856.

Report of the Commissioners on the Survey of the Western Addition of the City.

To the honorable common council of the city of San Francisco.

GENTLEMEN: The undersigned, commissioners, appointed to select under the provisions of ordinance No. 822 lots and squares
226 for schools, fire, hospital and other public purposes, in that portion of the city west of Larkin and southwest of Johnston streets, and to lay out the streets therein, beg leave to make the following report:

Your commissioners, after a patient and thorough examination of the land, have adopted the accompanying plan, or map thereof, showing the streets so laid out, and the lots and squares selected for the above public purposes, and recommend its adoption as the official map of the portion of the city above mentioned. Your commissioners found that it was impossible to perform the work assigned them without a partial survey being first made; and as no provisions were made by the city for defraying the expenses of

such survey, they became responsible for the hire of the chainmen, flagmen and other expenses incidental to the survey, expecting to be reimbursed by subscription, which has been partially done. The annexed schedule, marked "A," shows the total amount of their disbursements in making the survey.

The number of school lots selected is twenty-eight (28); their size one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half (137½ ft. by 137½ ft.), except those located on the Potrero, which are one hundred feet by two
227 hundred feet (100 ft. by 200 ft.). The number of lots for fire purposes is twenty-five (25); their size thirty feet by one hundred and thirty-seven and one-half feet (30 ft. by 137½ ft.) Six (6) squares or plazas are selected; size, four (4) blocks, containing about 12 acres each (12 a.), and four (4) squares, size, two (2) blocks, containing about five (5) acres each, and one lot for hospital; size, two (2) blocks.

Perhaps more lots and squares have been selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since, as a city enlarges, so do her wants.

Ordinance No. 822 gave your commissioners the power to take only the one-twentieth ($\frac{1}{20}$) of the land of one person for school, fire, hospital and other public purposes. In a great many instances they found, in laying out the lots for such purposes, that, in order to place them at proper distances from each other, they would fall entirely upon the land of one person, or cover his house or yard; and, moreover, in many cases, such persons did not own more than one block. In order, then, to avoid such difficulties we were
228 forced to locate some of the public lots and squares in places different from those originally designated.

Your commissioners also made personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city whenever called upon, provided the city would deed to them her right and title to the balance of their claim. The time is passed when it is necessary to support this course by argument. The city has pledged its faith by ordinance No. 822; the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it. Your commissioners would therefore recommend the appointment of two or three suitable persons with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title of the city to all parties in possession, as contemplated by ordinance No. 822.

All of which is respectfully submitted.

April 19th, 1856.

MICHAEL HAYES,
C. H. GOUGH,
Commissioners.

JOHN J. HOFF,
City Surveyor.

229 In the board of assistant aldermen, April 21st, 1856, said report was received, read and ordered published and laid over for further consideration.

Sixteenth.

Ordinance of December 17th, 1855, purporting to extend the time for commissioners to complete their work, by the board of aldermen, which is as follows:

The rules were suspended and the following ordinance was submitted:

Extending the time for the commissioners appointed by section 8 of ordinance No. 822 to complete their labors.

The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance 822, for the purpose of selecting and setting aside lands for public purposes, west of Larkin and south of Johnston streets, be and they are hereby granted until the 20th day of March, 1856, to complete their labors.

230 Passed to a third reading, and finally by following ayes: Cowie, Hopkins, Hathaway, Tewksbury, Greene and Slocomb.

Seventeenth.

Proceedings of the board of assistant aldermen, April 21st, 1856. Report of commissioners ordered published, and laid over for future consideration.

"A report was received from the commissioners appointed by virtue of ordinance No. 822, to select lots and public squares for school, fire, hospital and other purposes. On motion, it was ordered published and laid over for subsequent consideration."

Eighteenth.

The map mentioned in said act of the legislature of California, approved March 11, 1858, as the map, "which said plan and map was, by the justices of the peace, exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved and ratified by an order bearing date the 16th of October, A. D. 1856."

231 And which map was produced from the custody of the surveyor of the city and county of San Francisco, and which is certified as follows:

"For the location and dimensions of the streets to be laid out within the city limits, west of Larkin and southwest of Johnston streets, with the lots or grounds selected or set apart for the several public uses as hereon designated, made, selected and presented for the approval of the common council by the undersigned, city surveyor and commissioners, under and in pursuance of the provisions of an ordinance of the common council of the city of San Fran-

cisco, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855, and also an ordinance of the said common council, entitled 'Ordinance providing for selecting and designating public squares and reservations, for hospitals, fire-engine and school houses, and other public purposes, and for adopting the plan of the streets in the western and southwestern portions of the city, according to the pro-
232 visions of ordinance No. 822, and confirmatory of said ordinance No. 822,' approved September 27th, 1855.

C. H. GOUGH,
MICHAEL HAYES,
HORACE HAWES,
Commissioners.

JOHN J. HOFF,
City Surveyor."

And the portion of which affecting this controversy is as follows:

(Here follows map marked p. 232*a*.)

233 The plaintiffs next put in evidence a patent of the United States dated June 20th, 1884, to the city of San Francisco, based upon and reciting as the authority for the same the proceedings before the board of land commissioners. (District and circuit courts of the United States already in evidence.)

Said patent embraced within its exterior boundaries the lands involved in this case, and the granting clause thereof is in the words and figures following, to wit:

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress aforesaid of the third of March, anno Domini one thousand eight hundred and fifty-one, and the legislation supplemental thereto, has given and granted, and by these presents, does give and grant unto the city of San Francisco, its successors and assigns and upon the trusts named and set forth in the decree of court aforesaid, and in accordance with the provisions of the said act of Congress of March eighth, anno Domini one thousand eight hundred and sixty-six, the tract of land embraced and described in the foregoing survey; but with the stipulation that in virtue of the fifteenth section of the said act neither the confirmation of this said
234 claim, nor this patent, shall effect the interests of third persons; and with the further reservation, and exception from the transfer by these presents, as excepted by the aforesaid decree of the circuit court of the United States, dated the eighteenth day of May, anno Domini one thousand eight hundred and sixty-five, of "such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereun-

der by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city."

It was then admitted by the parties in the action, that the land in controversy in the action forms a part of the tract of land designated on the map put in evidence as Lafayette park, and that said tract called Lafayette park was within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California, on
235 the fifteenth of April, 1851, and situate west of Larkin street.

Plaintiffs rested.

The defendants to maintain the issue on their part then offered in evidence as their first defense the complaint, answer and judgment in the case of The People at the relation of George T. Bohen, plaintiffs, *vs.* S. W. Holladay, John Doe, Richard Roe, A. P. Anderson, defendants, which are as follows:

In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA at the Relation of GEORGE T. BOHEN
vs.
S. W. HOLLADAY, JOHN DOE and RICHARD ROE, and A. P. ANDERSON.
No. 11029.

236 The People of the State of California (by Frank M. Pixley, attorney general of the State of California) at the relation of George T. Bohen, a citizen of the United States and a citizen and tax-payer of the city and county of San Francisco, complaining allege.

That a certain piece or parcel of land situate in the city and county of San Francisco, State of California, and within the corporate limits thereof was heretofore by the lawful owner and proprietor thereof lawfully dedicated to and accepted by the public as a public plaza or square, and is and always since has been taken, recognized and marked and laid down upon the official map and plan of said city and county as a public square or plaza as aforesaid.

Said plaza or square being known and laid down on said map and plan as "Lafayette square," and described as follows: All that certain piece or parcel of land lying and being in said city and county of San Francisco, bounded on the north by Washington street; on the south by Sacramento street; on the east by Gough street; and on the west by Laguna street.

That said square or plaza is valuable for the purpose aforesaid, and with other public squares and plazas in said city were intended and do add to the comfort, convenience and health of the citizens resident in or visiting said city or county.

237 That the defendants have threatened to erect and construct, and have actually commenced to erect and construct fences and other permanent improvements directly within and upon said public square or plaza, which said purpose and threatening, if pursued and carried out, will greatly and irremediably interfere with and hinder the use and enjoyment by the public, and the citizens of the said city and county, of said public square or plaza as aforesaid.

That the relator is a resident, property-holder, and tax-payer of said city and county, and that he and many other tax-payers and residents of said city and county will be greatly and irremediably prejudiced by said threatened and attempted obstructions of said public square or plaza, if the same should be carried out and consummated, and that they and the people of this State are remediless, except by the order and decree of a court of chancery, where matters of this sort are properly and exclusively determinable.

Wherefore the people of the State of California, by said attorney general, at the relation aforesaid, pray that defendants, their agents, workmen, servants, and attorneys may be enjoined from erecting or constructing upon said public square or plaza any fences or other works or obstructions upon said square, and from digging upon or otherwise altering the same or any part thereof; and that
238 defendants be decreed and ordered to remove, at their own cost and expense, all such posts, fences or other improvements or obstructions as they may have placed upon said square or plaza heretofore, for the costs of suit, and such other and further judgment order and relief as may be proper in the premises.

FRANK M. PIXLEY,
Attorney General.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

George T. Bohen, the above-named relator, being first duly sworn, deposes and says: That he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

GEO. T. BOHEN.

Subscribed and sworn to before me this 16th day of November, A. D. 1863.

JAS. E. ASHCOM,
Dep. Co. Cl'k.

(Endorsed:) Filed November 16th, 1863. Wm. Loewy, cl'k, p'r Jas. E. Ashcom, D. C.

239 (Title of Court and Cause as above.)

IN PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

Answer.

And for answer to the complaint herein, the said defendants, S. W. Holladay, Hazard P. Herrick, therein called by the fictitious name of John Doe, and A. P. Anderson, admit, allege and deny as follows:

First. In answer to the first allegation in the complaint, wherein it is alleged that the land therein mentioned was, by the lawful owner and proprietor thereof, lawfully dedicated to the public, these defendants deny the same, and say that the said allegation is not true, but that the truth and facts concerning the alleged matter are as hereinafter stated.

Defendants deny that said square or plaza was ever in any manner, as such square or plaza, accepted by the public, and they say that the said allegation is not true, but that the truth and facts concerning the same are as hereinafter stated.

Defendants deny the allegation in the complaint wherein it is stated that the construction of said fence by defendants will hinder the public from the use of the alleged square or plaza. Defendants allege that the public have no right to the use of said land,
240 so far as the part thereof hereinafter described is concerned, either with or without the construction of said fence.

Defendants deny that they have threatened, intended or attempted to fence in or upon the whole of the land described in the complaint, but only the part thereof hereinafter mentioned and particularly described.

And the defendants, further answering aver that the full and true statement of all the facts of the case is as follows:

First. That the defendant, S. W. Holladay, is the owner of the land hereinafter described, and he contracted with the defendant, H. P. Herrick, to fence the same by subdivision fences, dividing lots from streets and lots, and the said H. P. Herrick employed the defendant, A. P. Anderson, a laborer, to dig the post holes and erect the fences on the ground, the material for which the said Herrick, contractor as aforesaid, had furnished and placed on the lots, and the said defendants Herrick and Anderson, have no other, further or different interest, in connection with the matter, than as contractor and laborer as aforesaid, and they pray that the said S. W. Holladay may be permitted to conduct and defend this action solely and on his own account, and at his own expense, these defendants hereby consenting and agreeing to abide the result of the adjudication as to him.

241 And for further and special answer defendants aver, that in the summer of the year of our Lord 1854, Philip W. Shepheard, Samuel W. Holladay, defendant herein, and Charles R. Saunders were in the actual and exclusive possession, occupation,

use and enjoyment of all the following-described tract or parcel of land, in the city and county of San Francisco:

Commencing at a point midway between Clay and Washington streets, 60 feet and 7 inches east of what is now called Van Ness avenue, running thence west, parallel and midway between Clay and Washington streets, in their present direction, to the top of the high hill, and to a point 44 feet 1 inch east of what is now known as Octavia street, and midway between Clay and Washington streets; running thence south six degrees west to a point midway between Clay and Sacramento streets, which point is also 33 feet 8 inches west of the east line of what is now Octavia street; running thence east, parallel and midway between Clay and Washington streets, to a point 60 feet and seven inches east of the east line of what is now Van Ness avenue; thence north in a line parallel with what is now Van Ness avenue, and 60 feet and seven inches east of the east line thereof to the place of beginning.

The parties last above named, in the spring of the year
242 1854, enclosed the land last above described with a strong and substantial board fence, on the line last above described.

That the said Shepheard, Holladay and Saunders, some of them all the time, and all of them some of the time, continuously and without interruption, from the month of November, A. D. 1854, to the present time, have lived, dwelt and resided, within and upon the said tract of land last above described, and as tenants in common, they, the said Shepheard, Holladay and Saunders, were in the actual and exclusive possession of said tract of land and the whole thereof, on and for some three months prior to the first day of January, A. D. 1855, which possession was continued and without interruption from any one up to and long after the 20th day of June, A. D. 1855, and after the introduction of the Van Ness ordinance into the common council of the city of San Francisco.

That in the month of June, A. D. 1855, the common council of the city of San Francisco passed an ordinance which was approved by the mayor of said city on the 20th day of the same month, numbered 822, entitled "An ordinance for the settlement and quieting of land titles in the city of San Francisco," commonly called the Van Ness ordinance, whereby said city of San Francisco did relinquish and grant all the right, title and claim of said city to the land above described to the said Shepheard, Holladay and Saunders, re-
243 serving the right to lay out and open streets through the same, and reserving also from said relinquishment and grant the right to select and set apart from the lands west of Larkin street and southwest from Johnston (now called Ninth street) whereof the land above described is a part, certain lots not exceeding one hundred and thirty-seven and one-half feet (137½ ft.) square each, for certain public purposes; and it was by said ordinance further provided that the city "may lay out and reserve upon said lands, at suitable and convenient points and distances, public squares, which shall not embrace more than one block, corresponding in size to the adjoining blocks," and it was in and by said ordinance further "provided, that the city shall not, without due compensation,

occupy for purposes mentioned in this section (meaning for public squares, among other things), after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person."

That said land and the whole thereof is situated within the corporate limits of the city of San Francisco, as defined by the act to incorporate said city passed April 15th, 1851, and always was and is above the natural high-water mark of the bay of San Francisco.

That after the passage of the Van Ness ordinance certain
244 commissioners appointed by the said city of San Francisco proceeded to lay out and designate streets, school lots and public squares upon a map or plan of that part of the city west of Larkin street and southwest from Johnston street, including the tract of land herein described, while said parties were so in the actual possession of the land above described.

That amongst other public squares so marked on said map by said commissioners is the tract of land described in the complaint and therein called Lafayette square, and which, contrary to the terms of said ordinance, embraces four blocks corresponding in size to the adjoining blocks, instead of one block only as prescribed by said ordinance.

That the tract of land above described, and in possession of said Shepheard, Holladay and Saunders, after laying out streets through the same according to said map, consisted in quantity eighteen fifty-vara lots of 137½ feet square each and a fraction of one lot over.

That said land called Lafayette square embraces in quantity six of said eighteen fifty-vara lots or one-third of the whole tract in the possession of said Shepheard, Holladay and Saunders, as aforesaid, after laying out the streets, and the said laying out of so much of their said lands on the map for a public square was without consultation with them, and without their consent, while at the
245 same time they were and always have been ready and willing to relinquish and appropriate one-twentieth of said land for the purposes mentioned in, and according to the provisions of said ordinance.

That in the year 1857 the said Chas. R. Saunders sold and conveyed by deed all his right, title and interest in said land to this defendant S. W. Holladay.

That since that time the said P. W. Shepheard and S. W. Holladay continued in possession thereof as owners and tenants in common till about the year 1861, when they partitioned said land between themselves.

That as the result of that partition and conveyances between the said Shepheard and S. W. Holladay, the latter became the sole owner of all their former interest, title and possession in the six fifty-vara lots, lying three of them on each side of Clay street, between Gough and Octavia streets, which six lots comprise about one-third of all and entire of the said tract of land above described, which tract embraced all the land in their possession to which said ordinance applied.

That said defendants Shepheard, Holladay and Saunders have always been ready and willing, and said Holladay, their successor in interest in and to the land in said tract west of Gough street, now is ready and willing, and has long prior to the commencement of this suit duly and regularly offered in writing to the proper
246 authorities of the city of San Francisco, to convey without cost for the use and purpose of a public square, at the place so designated a proportion of said land equal to one-twentieth of the entire claim or tract above described, and to convey all his interest therein on receiving due compensation therefor. And the said defendant now hereby offers, so to convey said one-twentieth for the purposes aforesaid, as soon as this court, or any other competent authority shall designate, what is that one-twentieth, and where it shall be located, and to convey the balance on receiving due compensation therefor.

And the defendants, further answering, say that they had intended and commenced to erect a fence or fences to inclose by subdivisions of the blocks three of those fifty-vara lots on the south side of Clay street, and between Gough and Octavia streets, which are embraced within said tract of land first above described, and comprising a part of the alleged public square, and also one other fifty-vara lot on the north side of Clay street and west of Gough street, composing the northwest corner of Clay and Gough streets, and these defendants did not, nor did either of them commence, attempt or threaten fencing in or upon any other land than that embraced within the limits of the tract first above described.

Defendants aver that neither the public nor the city of San
247 Francisco ever had the possession or occupation of said tract of land or any part thereof since the year 1854; but on the contrary, the same was in 1854, and ever since has been in the exclusive possession of said Shepheard, Holladay and Saunders, and those claiming through or under them, by fences, buildings and actual occupancy and dwelling thereon.

Wherefore, defendants demand judgment, that the complaint be dismissed with costs and for such other and further order or relief in the premises as may appear just and equitable.

S. W. HOLLADAY,
For Himself Personally and Attorney for Defendants Herrick and Anderson.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

S. W. Holladay, one of the defendants being sworn, says that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge—except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

S. W. HOLLADAY.

Subscribed and sworn to on this 27th day of November A. D. 1863, before me.

[SEAL.] W. O. ANDERSON,
Notary Public.

248 (*Admission of Service.*)

Due service of a copy of the foregoing answer is hereby acknowledged.

(Endorsed:) Filed this 27th day of November, A. D. 1863. Wm. Lowey, clerk, per L. J. Lee, deputy clerk.

(Title of Court and Cause as last above.)

IN PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

Judgment.

This case having come on regularly for trial before the court, without a jury, a trial by jury having been heretofore expressly waived by the parties in open court, the cause was tried by the court sitting without a jury; and witnesses for the respective parties having been duly sworn and examined, and certain documentary evidence having been read in evidence, and the cause duly submitted to the court upon briefs of the respective counsel.

And after due consideration thereof, the court having afterwards, on the 11th day of July, 1864, rendered its decision thereon, upon all the issues against the plaintiffs, and in favor of the defendants, and ordered the injunction theretofore issued in the cause
249 against the defendants to be dissolved and directed in said order counsel to draw findings.

And the counsel herein having, by their stipulation in writing, filed herein, expressly waived written findings, and consented that judgment be entered without written findings, pursuant to the order and decision of the court—it is now, therefore, by the consideration of the court ordered, adjudged and decreed that the plaintiffs take nothing by this action; but that the defendant, Samuel W. Holladay, was, at the time of the commencement of this suit, and is in the true and lawful possession as the owner thereof, of so much of the land and premises described in the complaint, as is claimed and described in his answer as "the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets," which lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

First. On the north by Clay street, on the east by Gough street, on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street, on the south by Clay street, and on the west by Octavia street.

250 That as to said parcels of land last above described as "First" and "Second," it is adjudged and decreed that the defendant, Samuel W. Holladay, was from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon, and that the said land never was, nor has been, by the lawful owner or proprietor thereof, lawfully, or in any way dedicated to, accepted, or used by the public as a public square or plaza, or for any public use; but that the same was all that time, and is the private property and in the actual and lawful possession of the defendant, Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant, Hazard P. Herrick, (who in the complaint is called by the fictitious name of John Doe), and the defendant, A. P. Anderson, had not, at the time of the commencement of this suit, or at any other time, any right or claim to any of the premises except as servants and workmen under and in the employ of defendant Holladay; and it is further adjudged and decreed that the defendant, S. W. Holladay, has not nor has he had at any time prior to the commencement of this suit, any right or title in or to the possession of any part of the premises
251 described in the complaint, consisting of four blocks, bounded by Washington, Gough, Sacramento and Laguna streets, except the six fifty-vara lots mentioned in his answer, and embraced in the parcels "First" and "Second" hereinabove described.

February 19th, 1876.

R. F. MORRISON, *Judge.*

Decree recorded February 23d, 1876, Book M, page 79.

(Endorsed:) Filed, February 19th, 1876. Thos. H. Reynolds, clerk; Wm. Ledlie, dep. clerk.

To this offer of the said judgment-roll the plaintiff objected, that the same was inadmissible, because it was irrelevant and immaterial to any issue in the cause, the issue in said action having been joined on the 27th day of November, 1863, before the passage of the act of Congress of July 1st, 1864; and further because the papers offered did not include the order of 21st of April, 1864, submitting the action for decision, and the order deciding the cause, dated July 11th, 1864, which orders formed a part of the judgment-roll in the case and are hereinafter set forth.

These objections were each and all overruled and com-
252 plaint, answer and judgment claimed by defendants to be the judgment-roll aforesaid, were admitted in evidence, to which ruling the plaintiff at the time excepted.

JOHN A. RUSSELL called as a witness for defendants stated that he is and had been clerk of the board of supervisors for more than twenty years, and as such had the official care and custody of the records of the common council of the late city of San Francisco, and

that there was no order or ordinance in the records of the former common council of San Francisco, other than those already offered by plaintiffs in confirmation of the selections of public squares and parks; under or in pursuance of ordinances 822 and 845, commonly known as the Van Ness ordinance.

The defendants next offered in evidence the following resolution of the board of supervisors dated February 4th, 1878, which is as follows:

"Resolution No. 11969, new series.

Resolved, That the city and county attorney be, and he is hereby instructed and required to immediately commence a suit or suits to recover for the public that part of Lafayette park in possession of S. W. Holladay and others, with respect to which judgments were obtained against the city and State in favor of said Holladay, in 1865, or thereabouts, for the purpose of de-
253 termining whether said judgments are a bar to the rights of the public in said land. And the clerk is hereby directed to advertise this resolution as required by the law. Adopted by the following vote: Ayes, Supervisors Foley, Mangels, Hill, Danforth, Smith, Rountree, Farren, Acheson, Scott, Haight, Gibbs, Brickwedel.

JOHN A. RUSSELL, *Clerk*."

To this offer the plaintiffs objected at the time, that said resolution was immaterial, irrelevant to any issue in the case, which objection was overruled and the resolution admitted in evidence, to which rulings the plaintiffs at the time excepted.

The defendants next offered an entry in the minutes of the proceedings of the board of supervisors, dated March 29th, 1887, in the following words:

"Appointing William Matthews, Esq., special counsel on behalf of the city and county in the suit in reference to Lafayette park, now pending in the supreme court, entitled The City and County *vs.* Samuel W. Holladay *et al.*"

To this offer the plaintiffs objected at the time that the testimony was irrelevant and immaterial to any issue in the case, the objection was overruled by the court, and the testimony was admitted in evidence, to which ruling the plaintiffs at the time excepted.

254 The defendants next called WILLIAM MATTHEWS, who stated, subject to the objection that the testimony was immaterial, that he had argued the present case in the supreme court, by employment of the finance committee of the board of supervisors, and had been paid by the city, that he was now acting as attorney for plaintiff in the case, under direction of the board of supervisors, and also by direction of citizens of California who are property-holders, owning land fronting on what is called Lafayette park, and by the latter persons his fees were paid; saying: To that extent we represent the city. I suppose we are here as attorneys of record for

the city, but the city refuses to pay anything for it, and the property-holders will pay it themselves. That is the whole matter.

Second Defense.

The defendants next offered in evidence the judgment-roll in the suit No. 11963, in the case of S. W. Holladay *vs.* The City and County of San Francisco, consisting of the complaint, answer, findings of the court, modification thereof, and judgment, which is as follows:

255 In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

SAMUEL W. HOLLADAY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

Complaint.

The above-named plaintiff complains of the above-named defendant, and for cause of action plaintiff alleges that he is the owner in fee-simple, absolute and in the possession of all the following-described land, situated within said city and county:

First: Commencing where the southerly line of Clay street intersects the west line of Gough street; thence running westwardly along the southerly line of Clay street four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence southwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, more or less, to the point midway between Clay and Sacramento streets; thence right angles eastwardly parallel and midway between Clay and Sacramento streets, four hundred and twelve and a half (412½) feet to the
256 west line of Gough street; thence northwardly along the last-named line one hundred and thirty-seven and a half (137½) feet, more or less, to the point of beginning.

Secondly: Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street four hundred and twelve and a half (412½) feet, to the easterly line of Octavia street; thence northwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, to the point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay and Washington streets, four hundred and twelve and a half (412½) feet to the west line of Gough street; thence southwardly along the last-named line one hundred and thirty-seven and a half (137½) feet to the place of beginning.

That the municipal corporation called The City and County of San Francisco, the defendant herein, claims or pretends to have some estate, right, title or interest in said land adverse to this plain-

tiff, which claim is false and groundless in law and equity; that said claim is a cloud upon plaintiff's title to said land and an injury and prejudice to plaintiff, who now brings this suit for the purpose of determining such adverse claim against defendant and in favor of plaintiff.

257 Wherefore plaintiff prays for the judgment of this court, and the said defendant have no right, title or interest in the above-described land or any part thereof, and for such other or further relief in the premises as may be just, and costs of suit.

S. W. HOLLADAY,
Plaintiff in Pro. Per.

(Endorsed:) Filed this 17th day of September, A. D. 1864. Wm. Loewy, clerk, per L. J. Lee, deputy clerk.

Defendants also put in evidence the summons in said action, issued December 20th, 1864, and returned by the sheriff bearing his endorsement thereon, showing that it was served on defendant December 22d, 1864, by delivering a copy of the summons attached to a certified copy of the complaint to H. P. Coon, mayor of the defendant, and filed in said cause December 28th, 1864.

(Title of Court and Cause.)

IN HOLLADAY
vs.
SAN FRANCISCO.

Answer.

The above-named defendant, The City and County of San Francisco, by her attorney, John H. Saunders, for answer to the complaint of the above-named plaintiff herein says:

258 That she denies each and every of the allegations in the said complaint contained.

Wherefore defendant prays to be hence dismissed with costs.

Dated, San Francisco, December 30th, 1864.

JOHN H. SAUNDERS,
Attorney for Defendants.

(Endorsed:) Filed Dec. 31st, 1864. Wm. Loewy, clerk, per Jas. E. Aschom, deputy clerk.

(Title of Court and Cause.)

IN HOLLADAY
vs.
SAN FRANCISCO.

Findings.

This cause came on regularly for trial before the court, without a jury, on the twenty-seventh day of September, A. D. 1865, when the

plaintiff appeared in proper person, on his own behalf, and the defendant the municipal corporation called The City and County of San Francisco, appeared by John H. Saunders, the city and county attorney, and John W. Dwinelle, Esq., of counsel, and the respective parties having duly introduced and submitted their proofs, and the court having heard the arguments of the respective counsel thereon, and considered the law and the evidence in the case, now decides and finds as follows:

259 1st. That the land described in the complaint is a part of the land which pertained to the town or pueblo which existed under the laws of Mexico, prior to the year 1846, and which then composed what is the present site of the city and county of San Francisco.

2nd. That the defendant herein has succeeded through the former corporation called the city of San Francisco to all the right, title and interest of the former pueblo or town and city aforesaid, except such interests as have been in the meantime alienated or disposed of by the former pueblo or city, defendant's predecessors.

3rd. That in the year 1852, the then city of San Francisco (successor in interest to said former pueblo and legal predecessor to the present defendant), in due form presented her petition or claim for confirmation to a certain tract of land, including the premises in question, to the board of land commissioners, organized and acting under the law of Congress entitled "An act to ascertain and settle private land claims in the State of California," approved March 3rd, 1851, wherein said claim was confirmed to the said city by said board of land commissioners, and afterwards, to wit: on the 18th day of May, A. D. 1865, the said claim of said city for confirmation was finally confirmed by the circuit — of the United States

260 for the district of California, the said cause having in the meantime been duly transferred, by and in pursuance of the laws of Congress, to the court last named, which, at the time was legally invested with jurisdiction to hear and determine the matter of said claim for confirmation.

4th. That the land described in the complaint is a portion of a larger tract, as existing in the year 1854, and defined and enclosed by substantial fences, bounding it on the north by a line midway between Washington and Clay streets; on the south by a line midway between Clay and Sacramento streets; on the east by what is now Van Ness avenue, and on the west by what is now the east line of Octavia street, comprising in all eighteen fifty-vara lots, excluding the street called Clay street, which has since been extended, running east and west through the centre of said tract, and other streets, to wit, Franklin and Gough streets, which have since been laid out and run north and south through said tract.

That during the summer and fall of the year 1854, the plaintiff and Philip W. Shepheard and Charles R. Saunders, his then cotenants, enclosed said tract, according to the above-mentioned boundaries, by a substantial fence of posts and boards, and built several substantial buildings therein, and exclusively claimed, used and oc-

cupied said land and the whole thereof, for the purpose of a
261 dwelling place, cultivation and other useful and substantial purposes, which use and occupation have continued by the plaintiff and his co-tenants therein from the year 1854, continuously down to the time of the commencement of this suit.

5th. That prior to the commencement of this suit, the plaintiff, by regular deeds of conveyance, derived from his said co-tenants, Shepheard and Saunders, all their right, title and interest in and to the land described in the complaint, and the whole thereof, and at the time of the commencement of this suit said plaintiff was in the actual and exclusive possession and occupation of all the land described in the complaint.

That on or about the 20th day of May, A. D. 1855, an ordinance was introduced into the common council of the city of San Francisco for passage, which afterwards passed and was approved by the mayor of said city, on the 20th day of June, A. D. 1855, which ordinance was thereafter known as and by the number 822, the same was entitled "Ordinance for the settlement and quieting of the land titles in the city of San Francisco," which ordinance is found printed in the statutes of this State for the year 1858, at page 52 and following.

That on the eighth day of August, A. D. 1855, the mayor of said city sent into the common council thereof a written communication, of which the following is a copy:

262 "MAYOR'S OFFICE, *August 8th*, 1855.

"To the common council.

"GENTLEMEN: By the terms of the ordinance approved June 20th, 1855, entitled 'An ordinance for the settling and quieting of land titles in the city of San Francisco,' it is provided that a commission, consisting of three persons, shall be chosen by the common council in joint convention, whose duty it shall be to select from the lands within the corporate limits of the city, and lying west of Larkin street and southwest of Johnston street, as many lots as the mayor and common council may, by ordinance, determine necessary for public and municipal purposes, and that said selection shall be made within six months from the passage of the ordinance so approved June 20th, 1855.

"The ordinance also declares that the city shall have the right to proceed to lay out and open streets as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserve the right, etc.

"I would respectfully suggest to the common council the propriety and expediency of adopting at an early moment the necessary measures to ascertain the lines and boundaries of the streets contemplated to be laid out and opened in the as yet unsurveyed portion of the city; and also to determine by ordinance
263 the number and dimensions of the lots to be selected for public and municipal purposes by the commission above referred to, and further to appoint said commission.

"It will be seen that until these preliminary steps are taken by the common council it will be impossible to determine with accuracy which lands are destined for streets and other public uses, and which are to be retained by the proprietors as private domain. In this condition of things, improvements in western and southwestern portions of the city will be greatly retarded and the wholesome and general benefits expected to be derived from the passage of the ordinance for the settlement and quieting of land titles within the city will be correspondingly delayed."

JAMES VAN NESS, *Mayor.*

That afterwards said common council passed an ordinance on the same subject, known as ordinance No. 845, which was approved by the mayor of said city September 27th, A. D. 1855, and is found printed in the volume of statutes above mentioned at page 55, which is hereby referred to as No. 3.

That on the 12th day of November, 1855, the board of aldermen and the board of assistant aldermen of said city, met in joint convention, for the purpose mentioned in section 1, of said ordi-
264 nance No. 845, and elected three commissioners as therein provided for, namely: Horace Hawes, Charles H. Gough and Michael Hayes.

That on the 21st day of December, 1855, ordinance No. 872, having passed by the respective boards, was on that day approved by the mayor, of which the following is a copy:

"SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance 822, for the purpose of selecting and setting apart lands for public purposes, west of Larkin street and southwest of Johnston street, be and they are hereby granted until the 30th day of March, 1856, to complete their labors."

That afterwards ordinance No. 901 passed said common council, and was on the 7th day of April, 1856, approved by the mayor in the language of the last-named ordinance, except extending the time to the 20th day of April, A. D. 1856, for the purposes therein expressed.

That on the 19th day of April, 1856, a report, signed by two of said commissioners, namely, Michael Hayes and Charles H. Gough, and certified to by John J. Hoff, city surveyor, was made to said common council, of which report the following is a copy:

265 *Report of the Commissioners on the Survey of the Western Addition of the City.*

"To the honorable common council of the city of San Francisco.

"GENTLEMEN: The undersigned commissioners appointed to select, under the provisions of ordinance No. 822, lots and squares for school, fire, hospital and other public purposes, in that portion of the city, west of Larkin street, and southwest of Johnston street and to lay out the streets therein, beg leave to make the following report:

"Your commissioners, after patient and thorough examination of the land, have adopted the accompanying plan or map thereof, showing the streets so laid out, and lots and squares selected for the above public purposes, and recommend its adoption as the official map of the portion of the city above mentioned. Your commissioners found that it was impossible to perform the work assigned them without a partial survey being first made, and as no provision was made by the city for defraying the expenses of such survey, they became responsible for the hire of the chainmen, flagmen and other expenses incidental to the survey, expecting to be reimbursed by subscription which has been partially done. The annexed schedule marked "A" shows the total amount of their disbursements in making the survey.

266 "The number of school lots selected is twenty-eight (28), their size, one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half (137½ ft. by 137½ ft.) except those located on the Potrero, which are one hundred feet by two hundred feet (100 by 200 ft.). The number of lots for fire purposes is twenty-five (25); their size, thirty feet by one hundred and thirty-seven and one-half (30 ft. by 137½ ft.), except those located on the Potrero, which are thirty feet by one hundred feet (30 ft. by 100 ft.). Six (6) squares or plazas are selected; size four (4) blocks, containing about twelve acres each (12 a.), and four (4) squares, size two (2) blocks, containing about five (5) acres each, and one lot for hospital, size, two (2) blocks. Perhaps more lots and squares have been selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since, as the city enlarges, so do her wants.

"Ordinance No. 822 gave your commissioners the power to take only the one-twentieth ($\frac{1}{20}$) of the land of any one person for school, fire, hospital and other public purposes.

"In a great many instances they found, in laying out the lots for such purposes, that in order to place them at proper distances from each other, they would fall entirely upon the land of one

267 person, or cover his house or yard; and, moreover, in many cases, such persons did not own more than one block. In order, then, to avoid such difficulties we were forced to locate some of the public lots and squares in places different from those originally designated.

"Your commissioners also made a personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city, whenever called upon; provided, the city would deed to them her right and title to the balance of the claim. The time is *passed* when it is necessary to support this course by argument. The city has pledged its faith by ordinance No. 822; the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it. Your commissioners would, therefore, recommend the appointment of two or three suitable persons, with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title

of the city to all parties in possession, as contemplated by ordinance No. 822.

"All of which is respectfully submitted.

"April 19th, 1856.

"MICHAEL HAYS.
"C. H. GOUGH.

"JOHN J. HOFF,
"*City Surveyor.*"

268 That the map or plan, referred to in said report, is now in the office of the city and county surveyor, and the same bears on its face a certificate signed by said commissioners, of which said certificate the following is a copy:

"City of San Francisco.

"For the location and dimensions of the streets to be laid out within the city limits west of Larkin street and southwest of Johnston street, with the lots or grounds selected, or set apart for the several public uses, as hereon designated, made, selected and presented for the approval of the common council, by the undersigned city surveyor and commissioners, under and in pursuance of the provisions of an ordinance of the common council of the city of San Francisco, entitled:

"'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855; and also an ordinance of the said common council, entitled:

"'Ordinance providing for selecting and designating public squares, and reservations for hospital, fire-engine and school-houses, and other public purposes, and for adopting the plan of the streets in the western and southwestern portions of the city, according to the provisions of ordinance No. 822, and confirmatory of said
269 ordinance No. 822,' approved September 27th, 1855.

"C. H. GOUGH,
"MICHAEL HAYES,
"HORACE HAWES,
"*Commissioners.*

"JOHN J. HOFF,
"*City Surveyor.*"

This report was, on the 21st day of April, A. D. 1856, received and read in the board of assistant aldermen and ordered published, and laid over for further consideration.

That the names of the streets on the part of said map, west of Larkin, and southwest of Johnston (now Ninth St.) streets were not on said map at the time of said report; but the same have since been placed thereon, from time to time, by the city and county surveyors.

That the parcels of land intended by said commissioners as public squares are designated on said map by the following titles:

Alta square, Alamo square, Hamilton square, Jefferson square,

Lafayette park, Lobos square; which contain four blocks each of the size of the adjoining and surrounding blocks, besides the streets intersecting the same.

That the parcel on said map designated as "hospital lot," contains 8.65 acres, and was located upon the then possession of
270 William Hart, and included about seven-eighths (⅞) of the parcel of land at the time actually possessed and occupied by him as his permanent homestead.

That the parcels of land mentioned by said commissioners in their report as having been by them selected for other public purposes than said plazas, and the said hospital lot, bear no name or other designation on said map than a shading of color.

That the land described in the complaint in this action is situated within what is designated on said map as "Lafayette park," through the center of which runs Clay street, east and west, and the street now called Octavia street, north and south.

That said Lafayette park, as laid out on said plan includes one-third of the said tract of land above described, which was from the year 1854 to 1857 in the actual possession of the plaintiff and his then co-tenants Shepheard and Saunders.

That on the 5th day of May, 1856, joint resolution No. 532, passed the common council of said city, of which the following is a copy:

Joint resolution No. 532, relative to receiving objections to the adoption of the plan of the Western addition.

Resolved, That a special committee of three from each board be appointed, to whom shall be referred the report and accompanying map of the city surveyor and commissioners, and that said
271 committee be instructed to meet daily at the office of the city surveyor, between the hours of three and four o'clock p. m., for one week, for the purpose of receiving objections to the recommendations of said surveyor and commissioners, and that said committee shall advertise said meetings, inviting all interested to present themselves and make known their desires, said committee to report at the next regular meeting of the board.

Passed the common council finally, May 5th, 1856.

WM. H. STEVENS,
Clerk of the Common Council.

That on the 15th day of May, A. D. 1856, the committee appointed under said joint resolution No. 532, made a report to the common council, of which the following is a copy:

"To the honorable common council of the city of San Francisco:

"Your committee appointed to attend at the city surveyor's office, and receive objections to the adoption of the report of the commissioners appointed to lay off the Western addition, and the plan drawn by the same, beg leave to report.

"That they have attended to this duty, and up to the present time have heard of but three complaints.

"In view of the large number of persons interested, your
272 committee must regard this opposition as entitled to slight regard, and believe the plan meets with the general favor of the people of that part of the city.

"They, therefore, recommend that the accompanying ordinance be adopted, which legalizes said plan, and makes provision for its being carried into effect.

"Your committee would further recommend that the city surveyor be instructed to report to the common council the names proposed for the different streets and squares, and that the same be first confirmed, or other names adopted in their place, before they be officially placed on the map.

"C. J. BARTLETT.
"CHAS. WILSON.
"WM. H. DOW.
"CHAS. H. CORSER.
"W. GREENE.
"G. W. BRYANT."

And the following is a copy of the accompanying ordinance therein referred to, and reported by said committee for adoption:

"An ordinance confirming the report of the commissioners appointed by the common council in pursuance of ordinance No. 845, entitled:

"An ordinance providing for selecting and designating public squares for reservations or hospitals, fire-engine houses and other public purposes, and for adopting the plan of streets in the
273 western and southwestern portion of the city, according to the provisions of ordinance No. 822, and confirmatory of said ordinance No. 822, passed September 27th, 1855, and authorizing the mayor to execute and deliver and accept and receive deeds in pursuance of the provisions of said ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco, passed June 20th, 1855.'

"SECTION 1. The common council hereby approves the map and plan of streets to be laid out within the city limits west of Larkin street and southwest of Johnston street presented by said commissioners acting in conjunction with the city surveyor, and approves the selections made by said commissioners of lands and lots for public uses, in pursuance of the eighth section of said ordinance, entitled 'An ordinance for the settlement and quieting of land titles,' passed June 20th, 1855.

"SEC. 2. The streets as represented on said map and plan referred to in the preceding section are hereby located and established as public streets, and the several lots and parcels of land by said commissioners selected as aforesaid are hereby dedicated, set apart and reserved for the several uses as in their said report specified.

"SEC. 3. The mayor is empowered to accept and receive,
274 and caused to be duly recorded the deeds of the city for the said lands and lots, according to section eight of the said

ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855, and to execute and deliver in the name of the city of San Francisco deeds of release and quitclaim to the several possessors entitled thereto, according to the provisions of sec. second of said ordinance.

"SEC. 4. The deeds so executed and delivered shall be signed as well by the grantee or grantees therein named as by the mayor, and the said grantee or grantees declaring his or their assent to the conditions of said ordinance No. 822, referred to in the preceding section, shall, on his or their part release and quitclaim to the city of San Francisco all the rights, privileges and reservations reserved to the city in and by the provisions and conditions of the ordinance last aforesaid.

"SEC. 5. No person shall be entitled to receive a deed under the provision of this ordinance until he shall have paid up all delinquent taxes and assessments levied by the city upon the land released to him, and shall also have executed, acknowledged and paid the expense of recording the deed properly required of him for the lands or lots selected from his possession for public uses under the provisions of the ordinance hereinbefore mentioned.

275 "SEC. 6. Aldermen —— —— and assistant aldermen —— —— are hereby appointed a joint committee from the board of aldermen and board of assistant aldermen, who are required to render their advice and assistance to the mayor in the execution of his duties under this ordinance, but shall not be required to sign the said deeds."

That on the 10th day of July, 1856, said common council became extinct by operation of the act approved April 10th, 1856, entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof."

That in pursuance of the terms of said act, the then justices of the peace in and for the then county of San Francisco, on and after the first day of July, A. D. 1856, till the close of that year, assembled from time to time and discharged the duties of a board of supervisors, of, in and for the city and county of San Francisco, created by said act of April 19th, 1856.

That on the 16th day of October, 1856, said justices of the peace assembled as a board of supervisors, adopted and entered on their minutes a preamble and resolution, of which the following is a copy:

276 "Whereas, by an ordinance of the last common council of the city of San Francisco, approved September 27th, 1855, a commission of three persons was created to make reservations for public uses, and to lay out streets in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled 'An ordinance for the settlement and quieting of land titles,'

with instructions to said commission to report their action in the premises to the common council for its approval.

"And whereas, said commission did discharge the duties assigned to it, and made report thereof as directed, upon which report coming in, the common council provided by a joint resolution that a certain number of days should be allowed for all persons having any objections to said report, or any part thereof, to represent the same.

"And whereas, said time expired, and no objections as the board is informed were made; but still the last common council omitted to take any final action on the report of said commission.

"And whereas, the board is advised and believes that it is proper for the public advantage that said report should be taken up and acted upon, so that doubts may be removed in regard to the location of the streets and the places to be set apart for public
277 squares and for the erection of public edifices in the portion of the city above referred to.

"And whereas, express power is given to this board by the 39th section of the act entitled: 'An act to repeal the several charters of the city of San Francisco to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' to lay out and open new streets within the former corporate limits of the city of San Francisco and west of Larkin street and southwest of Johnston street, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled 'An ordinance for the settling and quieting of land titles,' and as this board can see no objection to the plan known as the Western addition, reported by said committee:

"The board of supervisors of the city and county of San Francisco, do ordain as follows:

"SEC. 1. That the plan or map of the Western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board and be declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets."

278 Was adopted by the following votes:

Ayes—Messrs. Ryan, Chamberlain and Castro.

No—E. W. Smith.

That no other or further action was ever had by any of the municipal authorities of said city, or said city and county, upon the matters above mentioned, except as herein specially stated and recited.

That on the 11th day of March, A. D. 1858, the act of the legislature of this State, entitled: "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city," was approved.

As conclusions of law from the foregoing facts it is now found and decided by the court—

That the plaintiff was at the time of the commencement of this suit, and still is, the owner of an undivided nineteen-twentieths ($\frac{19}{20}$) of all and singular the parcels of land described in the complaint, as a tenant in common with the defendant, The City and County of San Francisco, the owner of the other undivided one-twentieth part thereof, as a tenant in common therein with the plaintiff Samuel W. Holladay.

The land and premises described in the complaint and now hereby referred to, are bounded and described as follows, viz:

First. Commencing where the southerly line of Clay street
279 intersects the west line of Gough street; thence running westwardly along the southerly line of Clay street four hundred and twelve and one-half (412½) feet of the easterly line of Octavia street; thence southerly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly parallel with and midway between Clay and Sacramento streets four hundred and twelve and a half (412½) feet, to the west line of Gough street; thence northwardly, along the last-named line one hundred and thirty-seven and one-half (137½) feet, more or less, to the point of beginning.

Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence northwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, to a point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay and Washington streets, four hundred and twelve and a half (412½) feet to the west line of Gough street; thence southwardly along the last-named line one hundred and thirty-seven and a half (137½) feet to the place of beginning.

280 And finally because of the tenancy in common in the said land existing between said plaintiff and said defendant, it is hereby ordered, adjudged and decreed that the complaint be dismissed with costs.

E. D. SAWYER,
District Judge.

Sept. 5, 1867.

(Endorsed:) Filed this 5th day of September, 1867. Wm. Lowey, clerk, per James E. Ashcom, D. C.

(Title of Court and Cause as last above given.)

IN HOLLADAY
vs.
SAN FRANCISCO.

Final Decree to Quiet Title.

The motion of plaintiff herein to modify the judgment heretofore entered herein so as to conform the same to the decision and

findings of fact and of law signed by the judge of this court and filed herein coming on regularly to be heard on the 17th day of September, 1867, the plaintiff being heard in support of his said motion and H. M. Hastings, Esq., the city and county attorney, being heard in opposition to said motion, and the court, having duly considered the premises, it is now therefore hereby ordered,
281 that the order and decree heretofore entered in this cause, dismissing the complaint herein, be and the same is hereby vacated and in place of said order and judgment dismissing plaintiff's complaint with costs, the following judgment be and the same is hereby rendered to wit:

From the facts and conclusions of law found, decided and signed by the judge of this court, and on file with the record in this cause, it is now hereby—

Ordered, adjudged and decreed that the said plaintiff, Samuel W. Holladay, is the owner in fee-simple absolute of an undivided interest of nineteen-twentieths ($\frac{19}{20}$) and no more, in and of the land described in the complaint and the whole thereof as a tenant in common, with the defendant, the municipal corporation *in* The City and County of San Francisco, which is the owner of an undivided one-twentieth ($\frac{1}{20}$) and no more, in and of the same land as a tenant in common with the plaintiff, and the said parties (plaintiff and defendant) are entitled to the possession of said land in accordance with their respective interests therein, as above stated—that is to say, $\frac{19}{20}$ thereof in the plaintiff and $\frac{1}{20}$ thereof in the defendant as tenants in common in that proportion—each with the other, and that as to his undivided $\frac{19}{20}$ thereof the title of said plaintiff be quieted as against said defendant, who is hereby adjudged
282 to have no right, title or interest therein, and that as to the other or remaining one-twentieth thereof belonging to the defendant, the title thereto be quieted as against the said plaintiff, who is hereby adjudged to have no right, title or interest therein.

The land and premises described in the complaint in this action and hereby referred to are situated in this city and county of San Francisco, State of California, and the same are bounded and described as follows:

First. Commencing where the southerly line of Clay street intersects the westerly line of Gough street; thence running westwardly along the southerly line of Clay street 412½ feet to the easterly line of Octavia street; thence southwardly along the last-named line 137½ feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly parallel with and midway between Clay and Sacramento streets 412½ feet to the west line of Gough street; thence northwardly along the last-named line 137½ feet, more or less, to the point of beginning.

Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street 412½ feet to the easterly line of Octavia street; thence northwardly along the last-named line 137½
283 feet to a point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay

and Washington streets 412½ feet to the west line of Gough street; thence southwardly along the last-named line 137½ feet to the place of beginning.

And it is further ordered and adjudged that each party pay his own costs herein without recourse as against the other.

Dated this 25th day of September, A. D. 1867.

E. D. SAWYER,
District Judge.

Decree recorded October 3d, A. D. 1867, in Judgment Book "G," at page 630.

Decree (endorsed). Filed Sept. 26, 1867.

Judgment-roll filed Oct. 3, 1867.

WM. LOEWY, *Clerk*,
By JNO. F. BODEN,
Dep. Clerk.

To the complaint, summons, answer, findings and judgment, just referred to, the plaintiffs objected at the time that each and all of said documents, papers and proceedings were irrelevant to any issue in this action:

First. Because the plaintiffs are strangers to the record in which the judgment was given—were never served with process therein and never authorized the submission of the rights of the plaintiffs to adjudication in said action.

284 Second. That to hold the said judgment to be a defense in this action would be to deprive the people of the rights in the land in controversy, granted to them by the act of Congress, approved July 1st, 1864, entitled An act to expedite the settlement of titles to lands in the State of California, and derived by them under the act of Congress, approved March 8th, 1866, entitled An act to quiet title to certain lands within the corporate limits of the city of San Francisco; and under an act of Congress approved July 23rd, 1866, entitled An act to quiet land titles in California; and under an act of Congress, approved March 3rd, 1851, entitled An act to ascertain and settle private land claims in the State of California, and under the acts of Congress amendatory thereof, without due process of law, in disregard of the guarantees of public aud private rights, secured by the Constitution of the United States and especially by the 5th and 14th amendments thereof.

The court overruled said objections, to which ruling the plaintiffs at the time duly excepted.

Defendants then introduced in evidence a paper bearing date February 13, 1878, and signed Jo. Hamilton, attorney general, in words and figures following, to wit:

285 "*Permit to Use the Name of the People.*

"THE PEOPLE OF THE STATE OF CALIFORNIA, by JO. HAMILTON, Attorney General, *ex Rel.* ANDREW J. BRYANT *against* SAMUEL W. HOLLADAY *et al.*

"ATTORNEY GENERAL'S OFFICE, *February 13th*, 1878.

"Upon reading the above petition filed in the above-entitled matter and upon being satisfied that this is a proper case for the use of the name of the people of the State of California and their attorney general for the enforcement of the right and the correction of the wrong in the said matter set out, leave is hereby given Andrew J. Bryant, the petitioner, and W. C. Burnett, his attorney, to use the name of the people of the State of California and to sue in such name in such court as may have jurisdiction of the subject-matter, and of the parties, and to sign the name of the attorney general to all pleadings and papers in any manner connected therewith, to the proper enforcement of the rights and correction of the wrongs in said petition set out. Upon the express terms and conditions, however, that the State of California shall in no event be held responsible for any cost, charges, or attorney's fees in or about the said suit or suits in any manner connected therewith. And to this end the said Andrew J. Bryant, relator, shall at the time of filing the complaint herein, file a good and sufficient bond with the said complaint to that effect with sufficient sureties in the sum of — dollars. And provided further, that the attorney general may at all times, at any and every stage of the said suit, withdraw
286 therefrom, and discontinue or dismiss the same as to him may seem fit and proper.

"Given at the office of the attorney general of California, this thirteenth day of February, 1878.

"JO. HAMILTON,
"*Attorney General.*"

(Endorsed:) "Filed 5th day of March, 1878. Thomas H. Reynolds, by M. J. McGrath, deputy clerk."

Third Defense.

The defendants next offered in evidence, the second amended complaint in the case of The City and County of San Francisco *vs.* S. W. Holladay *et al.*; and at the same time proved that the original complaint was filed in said action on the 23rd day of October, 1883; together with the answer to the second amended complaint; also the findings in the said action; also the judgment in the said action; also the notice of intention to move for a new trial; also the bill of exceptions on motion for a new trial; also the order denying the motion for a new trial, and also the notice of appeal to

the supreme court from said order, and also all the endorsements upon each of the same, which are as follows:

287 In the Superior Court of the City and County of San Francisco, State of California.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff,
vs.
SAMUEL W. HOLLADAY, GEORGIA C. O. HOLLADAY, MARY W. Mastick, Executrix of the Last Will of S. L. Mastick, Deceased, and R. G. Davisson, Defendants.

Second Amended Complaint in Ejectment.

The plaintiff complaining of the defendants alleges that the plaintiff is and at all time hereafter mentioned was a municipal corporation organized under the laws of the State of California.

That on or about the 1st day of October, 1883, one S. L. Mastick died, and the superior court of the State of California for the county of Alameda duly made and gave an order and judgment appointing the defendant Mary W. Mastick, executrix of the last
288 will and testament of said S. L. Mastick, deceased, and she thereupon duly qualified as and is the executrix of said last will and testament.

That the plaintiff is and was on the 10th day of July, 1878, seized in fee in trust for the use of the State of California as a public park, and for the use of the people of the city and county of San Francisco as a public common or square, and entitled to the possession of the following-described real property, situated in the city and county of San Francisco, State of California, to wit:

Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street; and

Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street; and on the west by Octavia street. Said parcels of land then were and now are a public park or square dedicated as such to the people of the State of California, and of the city and county of San Francisco.

That on said first-mentioned day the defendants wrongfully entered upon said land and ejected the plaintiff therefrom, and they have ever since withheld, and do now withhold the possession thereof from the plaintiff.

289 That the value of the use and occupation of said land during said time is the sum of ten thousand dollars.

And therefore the plaintiff prays judgment against the defendants for the restitution of said premises and the sum of $10,000, the value of the use and occupation thereof and also for costs.

WILLIAM CRAIG,
City and County Att'y, Att'y for Plaintiff.

(Endorsed:) Service by copy of within original is hereby admitted this 30th day of April, 1884. S. W. Holladay, att'y for defendants. Filed in open court this 2d day of May, 1884. Wm. T. Sesnon, clerk, by D. J. Crowley, dep. clerk.

(Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Answer to Second Amended Complaint.

Now come Samuel W. Holladay and Georgiana C. Ord Holladay, R. G. Davisson and Mary W. Mastick, executrix of the last will of Seabury L. Mastick, deceased, the defendants in the above-en-
290 titled cause, and for answer to the second amended complaint herein, they admit, allege and deny as follows, to wit:

I.

Said defendants deny each and all of the allegations of the complaint.

II.

And for further and separate answer and defense to this action, these defendants aver that the plaintiff should be and is barred and estopped from the further prosecution thereof, for that this same cause of action and all the matters involved and in issue therein are *res judicata* and in that behalf defendants allege as follows:

That on and prior to November 16th, 1863, S. W. Holladay, one of these defendants, was seized and possessed of all the following-described parcels of land, situated in the city and county of San Francisco, State of California, namely:

Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street; and

Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street; and on the west by Octavia street.

The said two parcels of land last above described are a
291 part of the land described in the amended complaint herein, and the whole thereof except the part included within the lines of Clay street, between Gough and Octavia streets, and as to that part so included within the lines of Clay street, these defendants disclaim the possession of the same, and aver that it is and for more than twenty years last past has been in and a part of an open public street, and in use as such free from any exclusive right, claim or possession on the part of these defendants or either of them to the same or to any part thereof.

That while said S. W. Holladay was seized or possessed as aforesaid of the premises above described as "parcel one" and "parcel

two," on November 16th, 1863, an action was commenced in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, wherein the people of the State of California, on the relation of George T. Bohen, were plaintiffs against Samuel W. Holladay and others, defendants; that in said action the plaintiffs alleged and claimed that said two parcels of land composed a part of a public square or plaza, marked and laid down as such upon the official map and plan of said city and county, and lawfully dedicated to and accepted by the public as such, and that the defendants therein including said S. W. Holladay, were unlawfully intruding and trespassing thereon,
292 and erecting fences, buildings and other permanent improvements as unlawful obstructions upon the same, and the plaintiff therein sought and prayed for an injunction to restrain further erections or building upon said premises, and to have the defendants and their buildings, fences and improvements abated and removed therefrom as a public nuisance.

That said S. W. Holladay, defendant in said action (who was the only defendant claiming any interest in the premises, the others named as defendants therein, being but his employees and workmen) appeared and answered the said complaint, claiming the land as his own and the right to the possession thereof, and denying that the same had been dedicated to or accepted by the public as a public square or plaza, and asserting that the same was his private property, free from all dedication to the public.

The land claimed by the said S. W. Holladay, defendant in that action, was the same land and none other than "parcel one" and "parcel two," above described.

Afterwards, to wit: April 21st, 1864, said cause came on regularly for trial in its order on the calendar, when the respective parties appeared by their attorneys, and introduced and submitted to the court their proofs and evidence, oral and documentary; the
293 testimony was regularly closed and the cause fully argued by counsel for the respective parties, and submitted to the court for its consideration and decision.

Afterwards, to wit: July 11th, 1864, the court rendered its decision in said cause upon all the issues therein, and duly gave and made its judgment against the plaintiffs and in favor of the defendants therein, and dissolved the injunction theretofore issued therein; which said judgment was and is final and has never been vacated, modified, appealed from or reversed, but still remains in full force and virtue.

Said action was commenced at the instance of this plaintiff, and the same was prosecuted by the aid of and for the benefit of The City and County of San Francisco, the plaintiff herein; the relator therein, George T. Bohen, then the street superintendent of said city and county, was acting for and at the instance of said city and county in the matter of said relation; said relator verified the complaint in said action; the city and county attorney appeared and assisted in the prosecution of said action; the said George T. Bohen appeared and testified as a witness for the plaintiff upon the

trial thereof, against the said S. W. Holladay, defendant therein. After said action had been fully tried, argued and submitted, said fourth district court, by its decision and judgment duly given
294 and made prior to the commencement of this action, adjudged and finally decided all the matters involved in said action against the plaintiffs therein, and in favor of the said S. W. Holladay, the defendant therein; all other defendants named in said action were merely workmen of said Holladay, having no interest in the matter.

The matters in litigation in that action were the same as in this; said matters were all finally adjudged in favor of the defendants therein; S. W. Holladay, the only defendant in said action having any interest therein, is the same S. W. Holladay, defendant herein, and the defendants herein, other than S. W. Holladay, have respectively purchased said premises, "parcel one" and "parcel two," and the whole thereof and have acquired the title thereto by good and sufficient conveyances of the same from him for full and valid considerations paid therefor, since the said matters were decided in his favor as aforesaid.

III.

And for other separate answer and defence to this action, these defendants allege that the plaintiff should be and is barred and estopped from the further prosecution thereof, for that this same cause of action and all the matters involved and in issue therein are *res judicata*, and in that behalf defendants allege as follows:

295 That on and prior to December 20th, 1864, S. W. Holladay, one of these defendants, was seized and possessed of all the following-described parcels of land, situated in the city and county of San Francisco, State of California, namely:

Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street; and

Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

These are the same parcels of land described above in paragraph two (2), and they are a part of the land described in the comp-aint herein, and the whole thereof, except the part included within the lines of Clay street, between Gough and Octavia streets, and as to the part so included within the lines of Clay street these defendants disclaim the possession of the same, and aver that it is, and for more than twenty years last past, has been in and a part of an open public street, and in use as such, free from any exclusive right, claim or possession on the part of these defendants or either of them to the same or any part thereof.

That while said S. W. Holladay was seized and possessed as aforesaid of said premises above described as "parcel one" and "parcel

two," on December 20th, 1864, he as plaintiff commenced his
296 action in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, against the municipal corporation, The City and County of San Francisco as defendant therein, which defendant was and is the same corporation, plaintiff in the present action.

That in his complaint in said action, said S. W. Holladay alleged his ownership and possession aforesaid of the above-described parcels of land, "parcel one" and "parcel two," and that the defendant therein was setting up a false and groundless claim thereto, adversely to plaintiff therein, and that said claim was a cloud upon his title and praying a judgment therein, that the defendant therein, said city and county, had no right, title or interest therein, and that his title be quieted as against the said defendant therein. Said city and county of San Francisco appeared, answered and contested the complaint in said action; and afterwards, to wit: September 25th, 1867, said fourth district court duly gave and made its judgment therein, that the said S. W. Holladay, plaintiff therein, was the owner in fee-simple absolute of an undivided nineteen-twentieths ($\frac{19}{20}$) of said two parcels of land, as a tenant in common with The City and County of San Francisco, defendant therein, the owner of the undivided one-twentieth ($\frac{1}{20}$) of the same two parcels
297 of land as tenant in common with said S. W. Holladay, the plaintiff therein.

That said judgment has never been appealed from, vacated, reversed or in any way modified, but the same still remains a final and valid judgment in the premises between said parties and their successors in interest.

After the rendition of the judgment above mentioned, said S. W. Holladay, for a full and adequate consideration, namely: the sum of $1,800 cash, sold and conveyed to Henry H. Haight, one parcel of said premises, being the easterly one-third of parcel two above described, being at the lot on the northwest corner of Clay and Gough streets, fronting 137½ feet on Clay street by 127 feet 8¼ inches on Gough street, by deed dated October 19th, 1868, and recorded October 20th, 1868, in Liber 446, of Deeds, page 127 of the county recorder's office, of said city and county of San Francisco.

Afterwards, to wit: February 16th, 1869, the said Henry H. Haight for full value, to wit, for the sum of $7,050, sold and conveyed the lot last named to R. G. Davisson, one of the defendants herein, by deed of conveyance duly recorded February 18th, 1869, in Liber 480 of Deeds, page 361, in the county recorder's office, of said city and county; said defendant Davisson entered under
298 said deed upon his lot so purchased, relying on said conveyance as a title, secured and settled by said judgment, and with the knowledge of plaintiff he placed costly improvements on the parcel by him so purchased, and paid street assessments levied thereon by plaintiff, and he still occupies, claims and holds said lot in his possession as the owner thereof.

And also, after the rendition of the judgment above mentioned, said S. W. Holladay, for a full and adequate consideration, on the

16th of July, 1868, sold and conveyed to Seabury L. Mastick, one other parcel of the demanded premises, namely: the easterly one-third of parcel one, above described, being the lot at the southwest corner of Clay and Gough streets, fronting 137½ feet on Clay street by 127 feet 8¼ inches on Gough street for the price of $4,500, in cash paid, therefor; the deed for which was recorded August 5th, 1868, in Liber 450 of De-ds, page —, in the office of the recorder of said city and county. Said S. L. Mastick entered under said deed of conveyance upon the lot by him so purchased from Holladay, relying on the same as a title secured and settled by the judgment aforesaid; and with the knowledge of the plaintiff, he erected valuable and costly improvements thereon, and paid street assessments levied thereon by plaintiff, and held and claimed and occu-
299 pied the same under said title down to the time of his death, which occurred December 6th, 1882.

That relying upon his title aforesaid, adjudicated in his favor as above described in this paragraph, and also in the preceding paragraph marked II (two), the defendant S. W. Holladay erected and placed costly, permanent and valuable improvements upon said premises, and especially upon the second parcel, next hereinafter described of the cost and value of $15,000 and upwards, with the full knowledge of plaintiff at the time the same were being erected and placed thereon; and he also paid street assessments levied thereon by plaintiff, and afterwards, to wit: May 5th, 1869, defendant S. W. Holladay, granted and conveyed by deed of conveyance of that date to his wife, defendant Georgiana C. Ord Holladay, the rest of said land, namely:

1st. The parcel bounded on the north by Clay street; on the west by Octavia street; on the south by a line midway between Clay and Sacramento streets; and on the east by a line 275 feet east of Octavia street and parallel therewith; and

2d. The parcel bounded on the west by Octavia street; on the north by a line midway between Clay and Washington streets; and on the east by a line 275 feet east of Octavia street and parallel therewith; and on the south by Clay street; which deed was
300 recorded May 8th, 1869, in Liber 506 of Deeds, page 157, in the office of county recorder, of said city and county, which latter parcel said S. W. Holladay and wife, Georgiana C. O. Holladay, have for the last thirteen years and upwards occupied and still occupy as their homestead.

IV.

And for other and separate defense these defendants aver that the plaintiff is barred and estopped from further prosecution of this action for that on March 20th, 1876, the plaintiff by its board of supervisors, unanimously passed an order which was on the 23d of March, 1876, approved by the mayor, entitled and numbered as follows, to wit:

"Order No. 1269. Providing for a partition and exchange of deeds between the city and county of San Francisco and the owners of certain lands."

Said order recites that "whereas the city and county of San Francisco, Seabury L. Mastick, R. G. Davisson and Georgiana C. Ord Holladay, are claiming as tenants in common all the following-described parcels of land in said city and county, viz: 'First: bounded on the north by a line 255 feet 4½ inches north of Sacramento street; on the south by a line 127 feet 8¼ inches north of Sacramento street; on the east by Gough street; and on the west by a line 412½
301 feet west of Gough street. Second: bounded on the north by a line 127 feet 8¼ inches south of Washington street; on the south by a line 255 feet 4½ inches south of Washington street; on the east by Gough street; and on the west by a line 412½ feet west of Gough street;'" (these are the same parcels of land in controversy in the present action) "of which two parcels of land said city and county claims the undivided one-twentieth as tenant in common with the other parties named," (meaning said R. G. Davisson, Seabury L. Mastick and Georgiana C. Ord Holladay), "who claim the other nineteen-twentieths in different parcels as between themselves, as tenants in common with said city and county."

"And whereas, by a decree rendered in the fourth district court, in a suit wherein The People of the State of California, by their attorney general are plaintiff, against S. W. Holladay and others, defendants (meaning the suit described in paragraph II above, which is hereby referred to for identification), it is adjudged that said land was never reserved or dedicated to any public use whatsoever, but that the same was the private property of S. W. Holladay the defendant therein."

"And whereas, the said parties, owners of said nineteen-twentieths of said land, successors in interest of said S. W. Holladay, have proposed a partition and segregation of their respective
302 interests from those of said city and county, which proposition the said city and county is desirous of accepting, and in settlement and segregation of the rights, interests and privileges of the said parties, and to effectuate said segregation and partition on their part, said Mastick, Davisson and Holladay have agreed to convey to said city and county by a good and sufficient deed of grant, all the following-described part of the parcel of land first above described, to wit:

"Beginning at a point 127 feet 8¼ inches north of the north line of Sacramento street, and 412 feet 6 inches west of the west line of Gough street; thence northerly and parallel with Gough street 127 feet 8¼ inches; thence easterly and parallel with Sacramento street 41 feet and 3 inches; thence southerly and parallel with Gough street 127 feet 8¼ inches; thence westerly and parallel with Sacramento street 41 feet 3 inches to the place of beginning, in exchange or equivalent for the claim and interest of said city and county, in all the rest of the two parcels of land first above described."

"Now, therefore, on the delivery of a good and sufficient grant or conveyance by said S. L. Mastick, R. G. Davisson and G. C. O. Holladay, to said city and county, for the parcel of said land last
303 above described, as for and in lieu of its claim and title in and to the whole of the rest of said two parcels of land, and

in partition by said city and county with said parties. The mayor of the city and county of San Francisco is hereby authorized and empowered to make, execute and deliver to said S. L. Mastick, R. G. Davisson and Georgiana C. Ord Holladay, or to their representatives respectively, deeds of grant and release for and in the name of said city and county, of all its right, title, claim and interest in and to all the rest and remainder of said two parcels of land first and secondly above described, according to their respective interests therein among themselves."

The land mentioned and referred to in said order, is the same land in litigation herein, and no other or different land, and the persons and parties named in said order No. 1269, as co-tenants in common with said city and county of said land, are those named in the complaint herein as the defendants to this action.

After the passage of said order No. 1269, the said G. C. O. Holladay duly executed and caused to be tendered to the mayor of said city and county for and on its behalf as grantee therein, a good and sufficient deed of conveyance, adequate to transfer and convey to
304 said city and county a clear and perfect title and possession of the parcel of said premises described in said order as the land to be conveyed to said city and county upon the partition provided for in said order; that is to say, the parcel 127 feet 8¼ inches by 41 feet 3 inches, above described; and thereupon she made demand of the mayor that he execute for and on behalf of said city and county, a deed or deeds of grant and release of all its right, title, claim and interest in and to all the rest and remainder of said two parcels of land above described to the defendants, as provided for in said order, but the mayor hitherto has refused and still refuses to execute any deed whatever to these defendants or either of them, in pursuance of said order of partition No. 1269, while these defendants always have been and still are ready to carry into execution the partition mentioned in said order No. 1269, and they now hereby offer to perform their part thereof, if said city and county, plaintiff herein, will perform its part of said order.

That by reason of said order 1269, and the premises above recited, plaintiff herein is estopped from further prosecution of this action.

V.

And for other and further defense defendants allege as fol-
305 lows: That the plaintiff is barred and estopped, and ought not to have or maintain this action, for they say that all the matters involved and in issue herein are *res judicata*, and in that behalf defendants aver that the plaintiff herein, prior to the commencement of this action, caused to be commenced March 5th, 1878, an action in the district court of the fifteenth judicial district of the State of California, in and for the city and county — San Francisco, wherein The People of the State of California, by the attorney general, on the relation of A. J. Bryant, were plaintiffs, against Samuel W. Holladay, Georgiana C. O. Holladay, S. L. Mastick and R. G. Davisson as defendants.

That in the complaint in said action it is averred that the parcel of land in the city and county of San Francisco, bounded by Washington, Gough, Sacramento and Laguna streets, had been on the 11th of March, 1858, dedicated to public use as a public square named "Lafayette park," and accepted as such by the public, and that the defendants therein mentioned had erected and constructed and were maintaining fences, buildings and improvements upon the portion of said square described in the complaint in this action, contrary to the alleged purposes of said dedication, and against the rights of the public therein; alleging the said buildings,
306 fences and improvements to be a common and public nuisance, and praying the judgment of the court thereon, determining the defendants therein and their buildings, fences and improvements to be public nuisances, and to enjoin and restrain defendants therein from the further continuance of their alleged obstructions and improvements upon said premises, and for the abatement of the same as public nuisances.

The mayor of the city and county was the relator in said complaint and signed and verified the same.

The land described therein as the place of defendants' obstructions and intrusions is the same land described in the complaint in the present action; the defendants therein were the same who are the defendants named in the complaint in this action.

The defendants in that action appeared and answered the complaint therein, denying the alleged dedication and acceptance of said square or any part thereof as a public square, and claiming as their own private property free from all dedication to public uses, the following parts of said square, therein called "Lafayette park," that is to say:

Parcel one.—Bounded on the north by Clay street; on the
307 east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

Parcel two.—Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street; and

The defendants in said action disclaimed all other parts of the so-called park or square except said parcel one and parcel two, which only they claim in the present action.

Before the trial thereof, said cause was duly transferred from the said 15th district court to the superior court in and for the city and county of San Francisco; and afterwards, to wit: October 19, 1881, it came on, and the trial was conducted and managed by attorneys employed by The City and County of San Francisco, plaintiff herein, and in its interest, and for the same purpose for which the present suit is brought; that is, to have the disputed premises adjudged to be a part of a public square, and to remove defendants and their property therefrom.

Afterwards, November 4th, 1881, said court duly made and gave its decision therein in writing, which was filed November

7th, 1881, upon which said court on the same day, to wit:
308 November 7th, 1881, duly made and gave its judgment in writing, whereby it was "ordered, adjudged and decreed that The People of the State of California, the plaintiffs herein, take nothing by this action, but that the defendants, Samuel W. Holladay, Georgiana C. Ord Holladay, Seabury L. Mastick and R. G. Davisson, have judgment for their costs."

The defendants named in the amended complaint in the present action are the same S. W. Holladay, G. C. O. Holladay, R. G. Davisson and S. L. Mastick, defendants in the action commenced in the 15th district court last above mentioned, and the interests of each and all of the defendants herein are the same as those of the defendants therein, except that December 6th, 1882, Seabury L. Mastick, one of the defendants therein, deceased after the rendition of said judgment, and his interest in the premises *are* vested in Mary W. Mastick, one of the defendants, who is the executrix of the last will of said S. L. Mastick, deceased, duly appointed as such by order of the superior court of the county of Alameda, California, duly given and made January 6th, 1883.

The judgment last above mentioned has never been in any way vacated or modified, but still remains in full force and virtue.

309 VI.

And for other and separate answer and defense to this action, defendants aver that the plaintiff ought not to have or maintain the same, because the whole subject-matter thereof has been tried and adjudged against the plaintiff and in favor of these defendants prior to the commencement of this action; and in that behalf defendants allege that prior to the commencement of this action the plaintiff herein instituted and prosecuted to a finality the following actions against S. W. Holladay, defendant herein, and some or all of the other defendants herein, who subsequently derive their right and title to the premises in dispute from him, namely:

1. The People of the State of California, on the relation of George T. Bohen, plaintiffs, against Samuel W. Holladay and other defendants, commenced November 16th, 1863, in the 4th district court, city and county of San Francisco, California; and, also,

2. The People of the State of California, on the relation of A. J. Bryant, plaintiffs, against Samuel W. Holladay and others, defendants, commenced March 5th, 1878, in the 15th district court, city and county of San Francisco, California; and, also,

310 3. Prior to the commencement of the present action the said S. W. Holladay, as plaintiff, commenced his action December 20th, 1864, in the 4th district court, city and county of San Francisco, California, against the same City and County of San Francisco, as defendant.

That in each of said three suits last above named the litigation was between The City and County of San Francisco (the plaintiff herein) on the one part, and the said S. W. Holladay (defendant herein) on the other part; and in each and every of said three suits

there was a well-contested trial, managed, conducted for and on the part of said city and county by its relators, attorneys, officers and witnesses exclusively, and on the other side said suits were managed and conducted by said S. W. Holladay and his associates against said city and county.

That in each and every of the three suits last mentioned the subject-matter thereof was the same as that of the present suit; on the part of The City and County of San Francisco, plaintiff herein, it was claimed, and the city and county, through its attorneys, asserted and sought to prove that the said city and county was seized in fee of the land which is described in the complaint in this ac-
311 tion, and that the land had been dedicated to public uses as part of a public square or plaza called Lafayette park, and that the said S. W. Holladay, and the other parties therein adverse to said city and county, had no right or to the possession thereof, but that their possession, occupation and improvements constituted an unlawful obstruction and a public nuisance.

On the other hand the said S. W. Holladay, on his own behalf and that of his codefendants in suits 1 and 2 above mentioned, wherein he and they were defendants, and for himself alone in said suit 3, above mentioned, wherein he was plaintiff, denied and by proofs traversed and contested said claims of ownership and dedication asserted by said city and county, and maintained the ground that the land claimed by him and his codefendants herein was his and their private property, never in any manner dedicated to public uses for a public square, or plaza or otherwise.

The land in said suits always claimed and litigated for and by said S. W. Holladay, was the following two parcels, namely:

Parcel one.—Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and
312 Parcel two.—Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street and on the west by Octavia street.

Said parcels last described are the same lands in litigation in the present action and no other land.

In each and all of the three suits last above specified the courts duly gave and made their respective judgments in favor of S. W. Holladay, and adversely to said claims of the city and county, to title, ownership and dedication of said lands to public uses.

The subject-matter and questions involved and in issue in each and all of said three suits were the same as those in the present suit, and they were fully tried, litigated and submitted on their merits in each and every of said suits and actually passed upon therein by the respective courts, and the judgments therein respectively were duly given and made in favor of S. W. Holladay, and adversely to said claims of said city and county on all the matters involved and in issue in said actions, which are the same matters involved and in issue in the present action and none other.

VII.

And for other and further answer and defense, defendants
313 allege that heretofore, to wit: on the 5th day of March, 1878, and long prior to the commencement of this action, the plaintiff herein caused to be commenced in the district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, an action wherein The People of the State of California, on the relation of A. J. Bryant, were plaintiffs and Samuel W. Holladay, Georgiana C. O. Holladay, S. L. Mastick and R. G. Davisson were defendants.

That in the complaint in said action it is averred that the parcel of lands in the city and county of San Francisco, bounded by Washington, Gough, Sacramento and Laguna streets, had been on the 11th day of March, 1858, dedicated to public use as a public square named "Lafayette park," and accepted as such by the public, and that the defendants therein mentioned had erected and constructed and were maintaining fences, buildings and improvements upon the portion of said square described in the complaint in this action contrary to the alleged purposes of said dedication and against the rights of the public therein, alleging the said buildings, fences and improvements to be a common public nuisance, and praying the judgment of court thereon, determining the defendants therein and their buildings, fences and improvements to be public
314 nuisances, and to enjoin and restrain defendants therein from the further continuance of their alleged obstructions and improvements upon said premises and for the abatement of the same as public nuisances.

The mayor of the city and county of San Francisco was the relator in said complaint and signed and verified the same.

The land described therein as the place of defendants' obstructions and intrusions is the same land described in the complaint in the present action.

The defendants in that action appeared and answered the complaint therein, denying the alleged dedication and acceptance of said square, or any part thereof as a public square, and claiming as their own private property, free from all dedication to public uses, the following parts of said square therein called "Lafayette park," that is to say:

Parcel one.—Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

Parcel two.—Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street;
315 on the south by Clay street, and on the west by Octavia street; and

The defendants in said action disclaimed all other parts of the so-called park or square, except said parcel one and parcel two, which only they claim in the present action.

Before the trial thereof, said cause was duly transferred from said fifteenth district court to the superior court in and for the city and

county of San Francisco, and afterwards, to wit: October 19th, 1881, it came on, and the trial was conducted and managed by attorneys employed by The City and County of San Francisco, plaintiff herein, and in its interest and for the same identical purpose and none other than for which the present suit is brought, and the same facts and all the same facts and issues, and none other than are in issue in this cause, were the facts and issues tried in said cause that is, to have the disputed premises adjudged to be a part of a public square, and to remove defendants and their property therefrom.

Afterwards, November 4th, 1881, said court duly made and gave its decision therein in writing, which was filed November 7th, 1881, upon which said court, on the same day, to wit: November 7th, 1881, duly made and gave its judgment in writing, whereby
316 it was "ordered, adjudged and decreed that The People of the State of California, the plaintiffs herein, take nothing by this action, but that defendants Samuel W. Holladay, Georgiana C. Ord Holladay, Seabury L. Mastick and R. G. Davisson have judgment for their costs."

That afterwards, to wit: on the 10th day of May, 1882, the plaintiffs in said action took and perfected an appeal from the said judgment therein rendered to the supreme court of the State of California, and the said action is now pending and undetermined in the said supreme court on such appeal.

That the defendants in that action and in this action are the same persons except the defendant Mary W. Mastick as executrix of the last will and testament of S. L. Mastick, deceased, is made one of the defendants in this action in place of the said S. L. Mastick who was one of the defendants in that action and who subsequent to the rendition of the said judgment therein, to wit: on the 6th day of December, 1882, died testate, and the said Mary W. Mastick was thereafter and before the commencement of this action duly appointed as and now is the executrix of the last will and testament of said deceased.

317 And these defendants therefore say that the plaintiff ought not to have or maintain this action to recover the possession, or damages for withholding the possession of the said lands in the answer of these defendants herein particularly described or any part thereof as lands dedicated to public use or to the use of the plaintiff as a public park or common or square, and because of such alleged dedication to the use of the public, for that they aver that the said action now so aforesaid pending in the supreme court of the State of California is another action pending between the same parties and for the same cause of action.

Wherefore the defendants pray the judgment of this court:

1. That the complaint be dismissed.
2. That plaintiff take nothing by the present action.
3. That it be adjudged that all the matters involved and in issue herein have been prior to the commencement of this action, adjudged and determined adversely to the plaintiff herein.
4. That the title of defendants herein be adjudged good, valid and perfect, free from all dedication to public uses.

5. That plaintiff, The City and County of San Francisco,
318 be restrained and enjoined perpetually from bringing any further suit or action against defendants or either of them, or their successors in interest, for the possession of the land in dispute herein or any part thereof, and from asserting, giving out or claiming that said lands, parcel one and parcel two, above described, the premises in litigation herein, or any part thereof, is in or a part of any public square, or dedicated to any public use.

6. That said parcels one and two be adjudged private property of these defendants respectively, as above claimed by them.

7. And for such other or further order, judgment or relief as may be just, with costs of suit.

S. W. HOLLADAY,
Attorney for Defendants.
R. H. LLOYD,
Of Counsel for R. G. Davisson.
E. B. MASTICK,
Of Counsel for said Executrix, Defendant.

(Endorsed:) Service of the within amended answer is hereby admitted, April 30th, 1884. William Craig, attorney for plaintiff. Filed in open court this 2d day of May, 1884. Wm. T. Sesnon, clerk, by D. J. Crowley, deputy clerk.

319 STATE OF CALIFORNIA, }
City and County of San Francisco. }

—— ——, being first duly sworn, deposes and says: That he is one of the defendants named in the above-entitled action, that he has read the foregoing second amended answer and knows the contents thereof; that the same is true of — own knowledge, except as to the matters stated therein on information or belief, and as to those matters that he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of ——, 1884.

—— ——.

(Title of Court and Cause.)

IN SAN FRANCISCO }
vs.
HOLLADAY. }

Findings.

This cause came on regularly for trial before the court without a jury on the 15th day of April, 1884, when each and all of the respective parties appeared by their attorneys; the evidence was introduced and submitted and the cause argued by the respective attorneys and regularly submitted for the decision of the court; and the court having fully considered the case, now finds as follows:

(NOTE OF EXPLANATION.—The complaint and answer referred to in these findings are the second amended complaint and the answer thereto, which were filed herein May 2d, 1884.)

320 I.

All and singular the matters and issues in this action and all the questions of title and dedication involved herein, were heretofore, and prior to the commencement of this action, heard, tried, and finally adjudicated and determined in favor of S. W. Holladay (one of the defendants herein) and against the plaintiff herein in an action commenced November 16th, 1863, in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, therein numbered 11029, wherein The People of the State of California were plaintiffs against said S. W. Holladay (and two others who were his servants only, having no interest in the controversy as defendants).

II.

The same land and no other land was the subject-matter of controversy in that action, No. 11029, and in this: that is, the land parcel one and parcel two described in the complaint and answer herein.

III.

The same title and the same question of dedication to public use and acceptance by the public were litigated and adjudicated in that action as in this action.

321 IV.

The former action, No. 11029, was commenced at the instance of the plaintiff herein, and the trial thereof was managed and conducted in the interests of said plaintiff and by her attorneys and officers, acting on her behalf.

V.

All and singular the matters and issues in this action, and all the questions of title and dedication involved herein, were heretofore and prior to the commencement thereof, heard, tried and finally adjudicated and determined in favor of S. W. Holladay, one of the defendants herein, and against the plaintiff herein, in an action commenced December 17th, 1864, in said fourth district court, and therein numbered 11963, wherein the said Samuel W. Holladay was plaintiff and The City and County of San Francisco, defendant.

VI.

The same land and no other land was the subject-matter of the two actions, that is: the said action, No. 11963, and of the present action, being the land parcel one and parcel two described in the complaint and answer herein.

VII.

In the last above named action (No. 11963) it was, on the
322 25th day of September, 1867, finally adjudicated and decreed by the court, respecting said parcels of land, in manner following, that is to say: "It is now hereby ordered, adjudged and decreed that the said plaintiff, Samuel W. Holladay, is the owner in fee-simple absolute of an undivided interest of nineteen-twentieths ($\frac{19}{20}$) and no more in and of the land described in the complaint and the whole thereof as a tenant in common with the defendant, the municipal corporation The City and County of San Francisco, which is the owner of an undivided one-twentieth ($\frac{1}{20}$) and no more, in and of the same land, as tenant in common with the plaintiff; and the said parties (plaintiff and defendant) are entitled to the possession of said land in accordance with their respective interest therein as above stated, that is to say: ($\frac{19}{20}$) thereof in the plaintiff and ($\frac{1}{20}$) thereof in the defendant as tenants in common in that proportion, each with the other, and that as to his undivided $\frac{19}{20}$ thereof the title of said plaintiff be quieted as against the said defendant, and who is hereby adjudged to have no right, title or interest therein; and that as to the other or remaining $\frac{1}{20}$ thereof belonging to the defendant the title thereto be quieted as against the said plaintiff, who is hereby adjudged to have no right, title or interest therein."

323 VIII.

The parties defendant herein, other than S. W. Holladay, have since the final adjudication in said cases numbered 11029 and 11963 respectively, above mentioned acquired all his right and title to the parcels of land the subject-matter of controversy herein, from him, by conveyances duly executed, acknowledged and recorded prior to the commencement of this action; the dates and particulars of which conveyances are truly and correctly set forth in their answer.

IX.

That prior to the commencement of this action, to wit: March 15th, 1878, the plaintiff herein caused to be commenced an action No. 11459, in the district court of the 15th judicial district of the State of California in and for the city and county of San Francisco, wherein The People of the State of California on the relation of A. J. Bryant, the then mayor of said city and county, were plaintiffs, and Samuel W. Holladay, Georgiana C. Ord Holladay, S. L. Mastick and R. G. Davisson were defendants; wherein it was claimed by plaintiffs, and denied by defendants, that the land in controversy therein and herein was a part of a public square, lawfully dedicated to public uses, and that the defendants therein
324 were unlawfully in the possession of the same as trespassers and intruders.

X.

Said cause was duly transferred to the superior court in and for this city and county of San Francisco. The said action was commenced and the trial thereof was managed and conducted in the interest of the plaintiff herein and by her attorneys and officers on her behalf.

XI.

That in said action the same land and none other was in controversy as in the present action; the same question of title and dedication to public use on the part of plaintiffs therein and claim of title by defendants therein were in issue and controversy and were tried and adjudicated in the present action; the same parties defendant in that action are the defendants in this action, except that Mary W. Mastick, defendant herein, appears as the executrix of S. L. Mastick, since deceased, who was a defendant in that action.

XII.

The said superior court, department 5, wherein said action was tried, duly gave and made its judgment therein November 4th, 1881, whereby it was adjudged against the plaintiffs therein,
325 and in favor of the defendants therein as follows, namely:
"By the consideration of the court it is hereby ordered, adjudged and decreed that The People of the State of California, the plaintiffs herein, take nothing by this action, but that the defendants herein, Samuel W. Holladay, Georgiana C. Ord Holladay, Seabury L. Mastick and R. G. Davisson, have judgment for their costs."

XIII.

Subsequently to said judgment the plaintiffs therein duly served and filed their notice of intention to move for a new trial therein, followed by a statement pursuant to notice, which statement was duly settled and filed March 30th, 1882.

XIV.

Afterwards, by the order of said court, duly given and made March 31st, 1882, the plaintiffs' said motion for a new trial in said action was refused.

XV.

Afterwards, to wit: May 10th, 1882, the plaintiffs in said action duly served and filed their notice of appeal to the supreme court of this State, from said judgment and the whole thereof, and also from said order refusing a new trial and denying plaintiffs' said motion therefor. Said action is still pending on said appeal in the
326 supreme court of the State of California, and the same has not been therein heard, tried or in any way disposed of.

XVI.

Plaintiffs never demanded of defendants and they the defendants never refused the plaintiffs the possession of the one-twentieth ($\frac{1}{20}$) of the premises in question. Plaintiffs' attorneys at the trial waived the right to recover herein an undivided one-twentieth ($\frac{1}{20}$) only; but demanded a judgment for the whole or none.

XVII.

The subject-matter of this suit and of these findings in the two parcels of land in the city and county of San Francisco, State of California, which are respectively bounded and described as follows, namely:

Parcel one.—Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street; and

Parcel two.—Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

327 I.

As conclusions of law applicable to the facts of this case the court finds that the plaintiff is estopped and barred from the prosecution of this action.

First. By the judgment and decree of the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco, in the above-mentioned case No. 11029, The People of the State of California against S. W. Holladay *et al.*

Second. By the judgment and decree of said fourth district court in case No. 11963, entitled S. W. Holladay *vs.* The City and County of San Francisco.

II.

That the defendants are entitled to judgment, that the plaintiff take nothing by this action and that the defendants do have and recover of and from the plaintiffs their costs.

Let judgment be entered accordingly.

Dated this 28th day of June, 1884.

T. H. REARDEN, *Judge.*

(Endorsed:) Filed June 28th, 1884. Wm. T. Sesnon, clerk, by J. Steppacher, deputy clerk.

328 (Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Amendment to Findings.

It appearing that certain expressions in the findings herein filed may be held to imply that counsel for plaintiff waived any claim to the one-twentieth undivided interest in the lands in the complaint demanded:

Now, therefore, the court and judge directs that said findings be, and the same are hereby amended so as to preclude any such construction or meaning.

And the court therefore expressly finds that neither the city and county attorney or any of the counsel for plaintiff in this present action has made any stipulation, waiving any right that the plaintiff may have to recover any of the lands described in the complaint.

August 15th, 1884.

T. H. REARDEN, *Judge.*

(Endorsed:) Filed in open court this 15th day of August, 1884. Wm. T. Sesnon, clerk, by D. J. Crowley, deputy clerk.

329 (Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Notice of Intention to Move for a New Trial.

The defendants will take notice that the plaintiff intends to move the court to set aside its decision and order for judgment herein and grant a new trial.

Said motion will be made upon the following grounds:

Errors of law occurring at the trial and excepted to by plaintiff.

Said decision is against law, and the evidence is insufficient to justify said decision.

Said motion will be made upon a bill of exceptions.

WILLIAM CRAIG,
City and County Attorney, Attorney for Pl'ff.

(Endorsed:) Service by copy of the within original is hereby admitted this 8th day of July, A. D. 1884. S. W. Holladay, attorney for defendants. Filed July 8th, 1884. Wm. T. Sesnon, clerk, by J. Steppacher, deputy clerk.

330 (Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Plaintiff's Proposed Bill of Exceptions on Motion for a New Trial.

Be it remembered that this action came on for trial on the 15th, 16th, 17th, 18th and 19th days of April, 1884, by the court without a jury, — having been waived.

The plaintiff appeared by its attorney and counsel, William Craig, J. H. Meredith, and William Matthews. The defendants appeared by their attorneys and counsel, S. W. Holladay, Burke Holladay, R. C. Harrison, W. C. Belcher, E. B. Mastick, R. H. Lloyd.

The plaintiff, to support the issues on its part, introduced the following testimony:

1st. Petition to the board of commissioners to ascertain and settle private land claims of the State of California, by the city of San Francisco, filed before the board July 2, 1852 (Exhibit No. 1), which is as follows:

To the honorable the board of commissioners to ascertain and settle private land claims in the State of California:

The petition of the City of San Francisco, a municipal corporation of the said State of California, respectfully shows:

331 That the said city claims a tract or parcel of land situate in the county of San Francisco, and State aforesaid, and being so much of the peninsula wherein the said city is located as will contain an area equal to four leagues square, said parcel or tract being bounded on the north and east by the waters of the bay of San Francisco, on the west by the Pacific ocean, and the south by a due east-and-west line, including the area aforesaid.

In pursuance of the laws, usages and customs of the government of Mexico, and an act of the departmental legislature of California, of November 9th, 1833, and proceedings in pursuance thereof, the pueblo of San Francisco was erected and constituted a municipal corporation, with a municipal government, and with all the rights, properties and privileges of pueblos under the then existing laws during the said year 1833, and there was then and there, by the supreme government of Mexico, in the manner by law prescribed, ceded and granted to the said pueblo, for town land and for common land, all and singular the premises herein first described. The said pueblo continued and was the proprietor of all and singular the said premises (except so much thereof as has been granted by the authorities of said pueblo in pursuance of law), and the

332 said pueblo continued its existence as such municipality and proprietor until after the accession of the Government of the United States, July 7th, 1846, and until, by an act of the legistature of the State of California, entitled "An act to incorporate the city of San Francisco," the inhabitants and property of said pueblo are

incorporated into a city, which city is now here exhibiting her claims to the premises aforesaid. The said act of the legislature of the State of California is prayed to be taken and read as a part of this petition. The same act was modified and changed by an act of the same legislature, passed A. D. 1851, which is also asked to be taken and read as a part of this petition.

On the seventh of July, 1846, the then pueblo, now city of San Francisco, was a town of the population of about one thousand inhabitants; and on the third of March, A. D. 1851, the population thereof amounted to about thirty thousand persons; and that on said seventh of July and on said third of March the said pueblo and city, under and by virtue of the grant aforesaid, and under and by virtue of the laws, usages and customs of the government of Mexico and California, all and singular the premises aforesaid (except as aforesaid) were part and parcels of the lands and premises of said pueblo and city.

There are several adverse claims to the one herein set forth.

333 One Don de Jesus Noé claims one square league, part of said premises, as particularly appears in his petition therefor now before your board, numbered 17 on the docket of claims. That Carman Sibrian de Bernal and José Corneleo Bernal claim one square league, part of said premises, which claim is more particularly exhibited in their petition therefor before your board, numbered 30 on the docket of claims. That Jacob S. Leese and Salvador Vallejo claim two hundred varas square, part of said premises, which claim is particularly exhibited in their petition therefor before your board, numbered 74 on the docket of claims.

That James R. Bolton claims three square leagues (with exceptions), part of said premises, which claim particularly appears in his petition before your honorable board, and numbered 81 according to the docket of claims. That Josefa de Haro and others claim the "Potrero de San Francisco," being one-half square league, part of said premises, the particulars whereof appear in their claim before your board, numbered 101 in the docket of claims.

That John F. Schulthess and others claim thirty-seven fifty-vara lots, part of said premises, particularly described in his petition on file with your board, and numbered 171 according to docket

334 of claims. That the said John F. Schulthess also claims forty-seven other fifty-vara lots, part of said premises, particularly described in his petition before your board, and numbered 182 of claims.

That Josefa de Haro and others claim premises known as the "Laguna de la Merced," one league long and one-half league wide, and particularly described in their petition before your board, numbering 102 of claims, and which is also part of premises herein first described.

That one Thomas O. Larkin claims a tract of land, parcel of said premises, and including a portion of the incorporated limits of the city of San Francisco to the west, and running thence westerly along the waters of the bay to the Pacific ocean, including the site

of the presidio: the quantity or particular description of his c laim this claimant is unable to state.

That Charles V. Stuart and Isaac N. Thorn claim a portion of said premises known as Ridley's ranch, under a grant to Jacob P. Leese, of one league and one-half, situate, contiguous to and north of the Sanchez ranch; but a particular description thereof cannot be given claimant.

The claimant represents to your honorable board that all and singular the foregoing adverse claims are insufficient and void. That all of them were made subsequent to the establishment of the pueblo of San Francisco, and that the grants therefor were in dero-
335 gation of the lawful claim and right of the said pueblo. That some of them were after the authority of the government of Mexico in the department of California had been suspended by the authority of the Government of the United States; that such is the fact particularly in the case of the land claimed by James R. Bolton, as aforesaid, and in the case of the lands claimed by Thomas O. Larkin, as aforesaid, and also in the case of the land claimed as aforesaid by John F. Schulthess and others, and by John F. Schulthess.

That all of said claims are based upon grants made without authority of law, and in direct violation of the laws and regulations of the government of Mexico in force in California.

The said city of San Francisco now insists that by the treaty of Guadalupe Hidalgo, the laws of nations, and the laws, usage and custom of the government of Mexico in force in California, as also by force of the act of the legislature of said State incorporating the said city, and the act of Congress of the United States entitled "An act to settle the private land claims in the State of California," approved March 3d, 1851, the said city has good and lawful claim to all and singular of the premises as aforesaid, and the said city relies upon the said laws, usages and customs, and proceedings in pursuance thereof, upon the order made for the establishment of
336 the pueblo of San Francisco, the record and other evidences of its existence, continuance and extent, the grant to said pueblo as aforesaid, and upon such other evidence as may be adduced touching the premises, upon a full exhibition and consideration of all which premises it is prayed that such claim be confirmed.

J. A. McDOUGALL,
For the City of San Francisco.

2nd. The decree of the board of land commissioners, filed in their office December 21, 1854 (Exhibit No. 2), in the words and figures following, viz:

Decree of Confirmation. Filed December 21, 1854.

United States Land Commission for California.

THE CITY OF SAN FRANCISCO
versus
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made is that known by the name of the pueblo lands of San Francisco, and is bounded as follows: Beginning at the little cove to the east of the fort, and running across to the beach, so as to leave the fort and the casameta
337 to the north; thence running along the beach to Point Lobos on its southern part; thence a straight line to the summit of the Devisadero, continuing said line to the east as far as the Punta del Rincon, including the Carnetales, and el Gentil, the said line will terminate within the bay of the mission of Dolores, the estuary of which will form a natural boundary between the municipal jurisdiction of that pueblo and the said mission of Dolores; thence along the shore of the bay of San Francisco, as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor José Figuerra to General Mariana G. Vallejo, dated Monterey, November 4th, 1834, marked Exhibit No. 18 to the deposition of M. G. Vallejo, taken in No. 280 H. I. T., and now on file among the papers in the case.

ALPHEUS FELCH.
R. AUG. THOMPSON.
S. B. FARWELL.

Which decree was filed Dec. 21, 1854.

3rd. The notice of appeal by Caleb Cushing, Attorney General, from decision of commissioners. Transcript filed with the Attorney General March 29, 1856, (endorsed) No. 427, U. S. dist. court. Filed June 2, 1856), in the words and figures following:

338 Appeal of the United States from the decree of the United States land commission confirming certain pueblo lands in said city, which notice of appeal was filed June 2, 1856.

OFFICE OF THE
ATTORNEY GENERAL OF THE UNITED STATES,
WASHINGTON, *15th April*, 1856.

"Pueblo lands."

City of San Francisco, claimant.

You will please take notice that in the above case, decided by the commissioners to ascertain and settle private land claims in the

State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 29th day of March, 1856, the appeal in the district court of the United States for the northern district of California will be prosecuted by the United States.

C. CUSHING,
Attorney General.

John A. Monroe, Esq., clerk U. S. D. C.

4th. The order of transfer of cause to U. S. circuit court, in accordance with act of Congress of July 1, 1864; which order is as follows:

Order transferring the case of the City of San Francisco *vs.* The United States from the district court of the United States for
339 the northern district of California to the circuit court of the United States for the same district.

At a stated term of the district court of the United States of America, for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the fifth day of September, in the year of our Lord, one thousand eight hundred and sixty-four.

Present: The Honorable Ogden Hoffman, district judge.

THE UNITED STATES
v.
THE CITY OF SAN FRANCISCO. } No. 427.

It appearing to the court that, by an act of the Congress of the United States, approved July 1st, 1864, the above-entitled cause, now pending under the act of March 3d, 1851, may be transferred to the circuit court of the United States for California, order that said cause be, and hereby is, transferred to the circuit court.

OGDEN HOFFMAN,
District Judge.

5th. The final order or decree of the U. S. circuit court, confirming the claim of the city, dated May 18, 1865, which is as follows:

340 *Final Decree Confirming the Claim of the City of San Francisco to its Pueblo Lands, Entered May 18th, 1865.*

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case taken by the petitioner, The City of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon

the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the northern district of California pending said appeal—the said case having been transferred to this court by order of the said district court, under the provisions of section four of the act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864,—and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged and decreed that the claim
341 of the petitioner, The City of San Francisco, to the land hereinafter described is valid, and that the same be confirmed.

The land of which confirmation is made is a tract situated within the county of San Francisco and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the bay of San Francisco, on the *the* west by the Pacific ocean, and on the south by a due east-and-west line drawn so as to include the area aforesaid, subject to the following deductions, namely, such parcels of land as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of lands as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming thereunder, by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the
342 lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

FIELD, *Circuit Judge.*

San Francisco, May 18th, 1865.

6th. The act of Congress of July 1, 1864.

Act of Congress of July 1st, 1864, ceding to the city of San Francisco all the right, title and interest of the United States in the lands embraced within the corporate limits of said city, as defined by the city charter of 1851, for the uses and purposes specified in the Van Ness ordinance, and also authorizing claims for pueblo lands to be transferred from the United States district courts to the United States circuit courts, and also regulating surveys of certain lands, and in words as follows:

Chap. CXCIV.—An act to expedite the settlement of titles to lands in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the

surveyor general of California shall, in compliance with the thirteenth section of an act entitled "An act to ascertain and settle the private land claims in the State of California," approved
343 March third, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the same has been done by publication, once a week for four consecutive weeks, in two newspapers, one published in the city of San Francisco and one published near the land surveyed; and shall retain in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same, and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days, by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days, the surveyor general shall transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, and objections and proofs filed with him in
344 support of the objections, and also of any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner, he shall endorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor general of California touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall endorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval.

SEC. 2. And be it further enacted, That the provisions of the preceding section shall apply to all surveys and plats by the surveyor general of California heretofore made, which have not already been approved by one of the district courts of the United States for California, or by the Commissioner of the General Land Office;
345 provided, that where proceedings for the correction or confirmation of a survey are pending on the passage of this act in one of the said district courts, it shall be lawful for such district court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the circuit court of the United States for the district, in like manner

and with like effect as hereafter provided for appeals in other cases to the circuit court; and such appeals may be in like manner disposed of by said circuit court.

SEC. 3. And be it further enacted, That where a plat and survey have already been approved or corrected by one of the district courts of the United States for California, and an appeal from the decree of approval or correction has already been taken to the Supreme Court of the United States the said Supreme Court shall have jurisdiction to hear and determine the appeal. But where, from such decree of approval or correction, no appeal has been taken to the Supreme Court, no appeal to that court shall be allowed, but an appeal may be taken within twelve months after this act shall take effect to the circuit court of the United States for California, and said circuit court shall proceed to fully determine the matter. The said circuit court shall have power to confirm, or reverse, or modify the action of the district court, or order the case back to the
346 surveyor general for a new survey. When the case is ordered back for a new survey, the subsequent survey of the surveyor general shall be under the supervision of the Commissioner of the General Land Office, and not of the district or circuit court of the United States.

SEC. 4. And be it further enacted, That whenever the district judge of any one of the district courts of the United States for California is interested in any land, the claim to which, under the said act of March third, eighteen hundred and fifty-one, is pending before him, on appeal from the board of commissioners created by said act, the said district court shall order a case to be transferred to the circuit court of the United States for California, which court shall thereupon take jurisdiction and determine the same. The said district court may also order a transfer to the said circuit court of any other cases arising under said act, pending before them, affecting the title to lands within the corporate limits of any city or town, and in such cases both the district and circuit judges may sit.

SEC. 5. And be it further enacted, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California, on the fifteenth
347 of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of the city," there being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office, by the surveyor general, of an approval plat of the exterior limits of San Francisco, as recognized in this section, in con-

nection with the lines of the public surveys; and provided, that the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof.

348 SEC. 6. And be it further enacted, That it shall be the duty of the surveyor general of California to cause all the private land claims finally confirmed to be made, whenever requested by the claimants, provided, that each claimant requesting a survey and plat shall first deposit in the district court of the district within which the land is situated a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first section of this act. Whenever the survey and plat requested shall have been completed and forwarded to the Commissioner of the General Land Office, as required by this act, the district court may direct the application of the money deposited, or so much thereof as may be necessary, to the payment of the expenses of said survey and publication.

SEC. 7. And be it further enacted, That it shall be the duty of the surveyor general of California, in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim. But when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in compact form. And if the char-

349 acter of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as near as practicable, in a compact form. And it shall be the duty of the Commissioner of the General Land Office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him.

SEC. 8. And be it further enacted, That the act entitled "An act to amend an act entitled 'An act to define and regulate the jurisdiction of the district courts of the United States in California, in regard to the survey and location of confirmed private land claims,'" approved June fourteenth, eighteen hundred and sixty, and all provisions of law inconsistent with this act, are hereby repealed.

Approved July 1, 1864.

7th. The act of the legislature of the State of California, incorporating the city of San Francisco, of April 15, 1851. Statutes of California of 1851, pp. 357–375, inclusive, and in words as follows:

350 Chap. 84.—An act to re-incorporate the city of San Francisco, passed April 15, 1851.

The People of the State of California, represented in senate and assembly, do enact as follows:

Charter of the City of San Francisco.

Article I.

General powers, boundaries, and wards.

§ 1. The People of the City of San Francisco shall continue to be a body politic and corporate, under the style of the "City of San Francisco," and by that name they shall have perpetual succession, may complain and defend in all courts, and in all actions and proceedings, and may purchase, receive and hold property, real and personal, and sell or otherwise dispose of the same for their common benefit; provided, that they shall purchase without the city only such property as may be necessary for the purposes of burial, or for the erection of prisons, hospitals, asylums and water works for supplying the city with water.

§ 2. The city of San Francisco shall hereafter be bounded as follows: On the south by a line parallel with Clay street, two and a half miles distant, in a southerly direction, from the centre of
351 Portsmouth square; on the west by a line parallel with Kearny street, two miles distant, in a westerly direction, from the centre of Portsmouth square. Its northern and eastern boundaries shall be coincident with those of the county of San Francisco.

§ 3. The said city shall continue as now divided into eight wards, which number shall not be altered, unless by act of the legislature. The common council shall, at least three months before the general election in the year eighteen hundred and fifty-two, and also during the second year thereafter, redistrict the city, so that each ward shall contain as near as may be the same number of inhabitants.

Article II.

Of elections.

§ 1. For the government of said city there shall be elected annually, by general ticket, the following officers: A mayor, recorder, comptroller, treasurer, collector, attorney, marshal, street commissioner, and three assessors; and, also, by the respective wards, a body of aldermen and a board of assistant aldermen.

§ 2. No person who is not a qualified voter shall be eligible to any office under this charter, nor shall any person be enti-
352 tled to vote at any city election unless he shall be an elector for State officers, and have resided in the ward thirty days next preceding said election.

§ 3. All vacancies, except as hereinafter provided, shall be filled by election in such manner as may be prescribed by ordinance.

§ 4. It shall be the duty of the common council to call all city, elections, to designate the places of holding the same, giving at least ten days' notice thereof, to appoint inspectors of elections, to examine the returns and declare the results, and to determine contested elections.

§ 5. The first general election for officers under this charter shall be held on the fourth Monday of April, one thousand eight hundred and fifty-one, and thereafter annually at the general election for State officers. No election shall be held in any place where intoxicating liquors are vended.

§ 6. All provisions of law regulating elections for State officers shall apply, so far as practicable, to elections under this charter.

§ 7. When two or more persons have an equal and the highest number of votes for the office of mayor, the common council shall decide the election by joint ballot.

353 § 8. At the first election under this charter, only two assessors shall be elected, and the county assessor shall act as one of the city assessors during the term for which he was elected.

Article III.

Of the common council.

§ 1. The legislative powers of the city shall be vested in a board of aldermen and a board of assistant aldermen, which shall each consist of one member from each ward, and shall form the common council of the city. No person shall be eligible to either board who shall not be an elector of the ward for which he may be elected; nor shall he be a member except whilst a resident of the ward which he represents.

§ 2. Both boards shall assemble on the first Monday after their election; they shall sit in separate chambers, and their proceedings shall be public. A majority in each board shall be a quorum, but a smaller number may adjourn from time to time, and may compel the attendance of absent members. Each board shall elect a president from its own body, choose its clerk and other officers, determine the rules of its proceedings, judge of the qualifications of its own members, and keep a journal of its own proceedings, and

354 shall have power to compel the attendance of members, to punish them for disorderly conduct, and, with the consent of two-thirds, to expel a member. Either board may originate or amend any ordinance of resolution, and no ordinance or resolution shall be passed unless by a majority of all the members elected to each board. On the final passage of every ordinance or resolution, ayes and nays shall be taken and entered upon the journal.

§ 3. Every ordinance passed by both boards shall, before it takes effect, be presented to the mayor for his approval. If he approve, he shall sign it; if not, he shall return it with his objections to the board in which it originated. Said board shall enter the objections on its journal, and publish them in some city newspaper. If, at any stated meeting thereafter, two-thirds of all the members elected to each board shall agree to pass said ordinance, notwithstanding the objections of the mayor, it shall become a law. Should any ordinance not be returned by the mayor within ten days after he shall have received it, it shall become a law, the same as if it had received his signature.

§ 4. Every ordinance providing for any specific improve-
355 ment, the creation of any office, or the granting of any privilege, or involving the sale, lease, or other appropriations of public property, of the expenditure of public moneys (except for sums less than five hundred dollars), or laying any tax or assessment, and every ordinance imposing a new duty or penalty, shall, after its passage by either board, and before being sent to the others be published, with the ayes and nays, in some city newspaper, and no ordinance or resolution which shall have passed one board shall be acted upon by the other on the same day, unless by unanimous consent.

§ 5. The common council shall not create, nor permit to accrue, any debts or liabilities, that shall exceed the sum of fifty thousand dollars over and above the annual revenue of the city, unless the same shall be authorized by ordinance for some specific object, which ordinance shall provide ways and means, exclusive of loans, for the payment of the interest thereon as it falls due, and also to pay and discharge the principal within twelve years; but no such ordinance shall take effect until it shall have been submitted to the people and receive a majority of all the votes cast at such election; and all money raised by authority of such ordinance shall be applied only to the object therein mentioned, or to the payment
356 of the debt thereby created; provided, that the present debt of the city, with the interest accruing thereon, shall make no part of the fifty thousand dollars aforesaid.

§ 6. The common council shall have no power to borrow money on the credit of the city, unless they shall by ordinance direct the same in anticipation of the revenue for the current year, and shall provide in said ordinance for repaying the same out of such revenue, nor in such case shall they borrow a sum to exceed fifty thousand dollars; but a larger sum may be raised by loan for the purpose of extinguishing the present liabilities of the city, whenever the ordinance providing for the same shall first be approved by the electors of the city at any general election; provided, that said loan shall bear a yearly rate of interest not to exceed ten per cent., and shall be payable within twenty years.

§ 7. The common council shall have power to emit bills of credit, or to issue or put in circulation any paper or device as a representative of value or evidence of indebtedness, to award damages for the non-performance or failure on their part of any contract, to loan the credit of the city, to subscribe to the stock of any association or corporation, or to increase the funded debt of the city, unless
357 the ordinance for that purpose be first approved by the people at a general election; but this section shall not be construed to prohibit the auditing and certifying of accounts by the proper officers to the creditors of the city, but no such audited or certified accounts shall draw interest.

§ 8. Annual and occasional appropriations shall be made by ordinance for every branch and object of city expenditure, and no money shall be drawn from the treasury unless the same shall have been previously appropriated to the purpose for which it is drawn.

Every warrant upon the treasury shall be signed by the comptroller, and countersigned by the mayor, and shall specify the appropriation under which it is issued, and the date of the ordinance making the same. It shall also state what fund and for what purpose the amount specified is to be paid.

§ 9. There shall be elected annually by ballot a joint committee of accounts, to consist of three members from each board, who shall meet at least once a month, and examine all accounts of the finance department, and report thereon in writing to both boards of the common council.

§ 10. No member of the common council shall, during the
358 period for which he was elected, be appointed to any office under this charter, nor be interested in any contract or business, or the sale of any article, the expense of which is borne by the city; nor shall any member be interested in the purchase of any property belonging to the city, or which may be sold for city taxes; nor shall any member sell or offer for sale to the city any property in which he may be interested.

§ 11. No member of the common council shall vote on any question in which he may be interested, either personally or as agent for another.

§ 12. The common council shall have power, and it shall be their duty, annually to raise, by tax on the real and personal property in the city, whatever amount of money may be requisite for the support of free common schools, and to provide suitable buildings therefor.

§ 13. They shall also have power within the city to pass all proper and necessary laws for the regulation, improvement, and sale of city property; for the levy and collection of city taxes on all taxable property, not to exceed one per cent. a year upon its assessed value; for the laying out, making, opening, widening, regulating, and keeping in repair all streets, roads, bridges, fences,
359 public places and grounds, wharves, docks, piers, slips, sewers, wells, and alleys, and for making the assessments therefor; for regulating and collecting wharfage, dockage, and cranage upon all water craft and all goods landed; for securing the protection, health, cleanliness, ornament, peace and good order of the city; for the prevention and extinguishment of fires; for regulating firemen, watchmen, policemen, and such other officers as it may be necessary to appoint; for the care and regulation of prisons, markets, houses of correction and industry; for the support, regulation, and employment of all vagrants and paupers; for licensing, taxing, and regulating all such vehicles, business, and employment as the public good may require, and as may not be prohibited by law, and for making such licenses to prohibit aud suppress dramshops, gambling-houses, and houses of ill-fame, gaming, hawking, pawn-broking, and all indecent or immoral practices, amusements and exhibitions; to regulate the location of slaughter-houses, markets, stables and houses for the storage of gunpowder and other combustibles; for the establishment of a chain-gang, and rules and regulations for the government of the same; and, in brief, to pass

all such other laws and ordinances for the management, good government, and general welfare of said city as may not be
360 inconsistent with this charter, or with the laws or Constitution of this State or of the United States, and to affix penalties to the violation of any ordinance; but such penalties shall not exceed imprisonment for sixty days, and a fine of five hundred dollars.

§ 14. All money to be received from the following sources shall continue to constitute a sinking fund for the payment of the existing city indebtedness, with the interest accruing thereon, until the same shall be cancelled:

1st. The net proceeds of all sales of real property belonging, or that may hereafter belong, to the city.

2d. The net proceeds of all bonds and mortgages payable to the city.

3d. For occupation of private wharves, basins, and piers.

4th. For wharfage, rents and tolls.

Said fund, or any part thereof, shall not be loaned to any other fund, or expended for any other purposes whatever.

§ 15. The common council shall at an early day take steps
361 to fund by ordinance the existing debts of the city. The funded debt shall consist of:

1st. The liabilities for the payment of which the city revenue is already pledged.

2d. The creditors of the city may fund the debts respectively due them at the passage of this act, on such terms as the common council may prescribe, at a rate of interest not to exceed ten per cent. a year, and payable within ten years; but no bond shall issue of a less denomination than one hundred dollars.

§ 16. The common council shall have power to allow extra compensation to any creditor of the city, on account of any depreciation to which the city bonds, warrants, or other evidences of indebtedness may be liable.

§ 17. The commissioners of the sinking fund created by ordinance of the common council are hereby prohibited from permanently disposing of any property belonging to the city by sale, lease, or otherwise, and also required to reconvey and deliver to the city, before the tenth day of May next, all property, titles, rights and interests belonging to the city, and which are or may be in their possession.

362 § 18. The board of assistant aldermen shall have the sole power of impeachment, and all impeachments shall be tried by the board of aldermen. No person shall be convicted unless by the concurrence of two-thirds of all the members. Judgment, in case of conviction, shall extend no further than removal from office, and disqualification from holding any office under the charter; but the party convicted may be indicted and punished according to law.

Article IV.

Of executive officers.

§ 1. The executive power of the corporation shall be vested in the mayor and such other executive officers as are or may be created by law, and neither the common council nor any committee or member thereof shall perform any executive or ministerial business unless specially directed by law.

§ 2. It shall be the duty of the mayor:

1st. To communicate to the common council semi-annually, and oftener if he shall think proper, a general statement of the situation and condition of the city in relation to its government,
363 finances, and improvements, with such recommendation in relation thereto as he may deem expedient.

2. To be vigilant and active in causing the laws and ordinances of the city to be duly executed and enforced; to be the head of police; to exercise a constant supervision and control over the conduct of all subordinate officers, and to receive and examine into all such complaints as may be preferred against any of them for violation or neglect of duty, and to certify the same to the common council; to countersign all licenses and warrants on the treasury, and generally to perform all such duties as may be prescribed for him by law or by the city ordinances.

§ 3. Whenever there shall be a vacancy in the office of mayor, or the mayor shall be absent from the city, or be prevented from attending to the duties of his office, the president of the board of aldermen shall perform the duties, receive the compensation, and possess all the rights and powers of mayor during such vacancy, absence, or disability.

§ 4. It shall be the duty of the treasurer to receive and pay out all moneys belonging to the city, and to keep an account of all receipts and expenditures under such regulations as may be
364 prescribed by ordinance. The treasurer shall make monthly to the common council a full statement of the receipts and expenditures of the preceding month, and publish the same in some city newspaper.

§ 5. It shall be the duty of the comptroller to report to the common council monthly a full and detailed statement of all the expenses and payments of the city government, and the state of each appropriation made by ordinance; and he shall also, at the expiration of the fiscal year, publish a full and detailed statement of the receipts and expenditures of the city during said year, specifying the different sources of revenue and the amount received from each, the several appropriations made by the common council, the objects for which they were made, and the amount of money expended under each; the moneys borrowed on the credit of the city, the authority under which each loan was made, and the terms on which it was obtained; the amount of the funded debt and of the interest accrued thereon, with a detailed statement of the sums owed and the property owned by the city.

§ 6. It shall be the duty of the marshal to execute all process

issued by the recorder, or directed to him by any legal au-
365 thority; to attend upon the recorder's court; to arrest all persons guilty of a breach of the peace or violation of any ordinance, and take them before the recorder; to supervise and control the city police, to superintend the city prison, and to perform all such duties as may be prescribed by ordinance.

§ 7. It shall be the duty of the city attorney to attend to all suits, matters and things in which the city may be legally interested; to give his advice or opinion in writing whenever required by the mayor or common council, and to perform all such other services in connection with his profession as may be required by the common council.

§ 8. It shall be the duty of the collector to issue all licenses that may be granted by city authority, and to register the same in a suitable book, which shall at all times be open for public inspection; to collect all license taxes, and all taxes and assessments that may be due according to the assessment books, and to pay over the same to the treasury in the specific funds received.

§ 9. It shall be the duty of the assessors to prepare, within such time as the common council may direct, a correct list of all
366 the taxable property within the city, with the true valuation thereof, and to present the same, certified by them, to the common council. The mode of making out said list, and of ascertaining the value of property, and of collecting all taxes, shall be the same as is or may be prescribed by law for assessing and collecting the State revenue. Should the owner of any property assessed as aforesaid not be satisfied with the valuation thereof, he may apply, under oath, to the board of assessors for the reduction of the assessment. If said board refuse, he may appeal to the board of aldermen, and their decision may be final.

§ 10. The recorder, as to offenses committed within the city, shall have like jurisdiction as may be conferred upon justices of the peace. He shall also have final jurisdiction in all cases of assault, riot, breach of the peace, and petit larceny, and all crimes and misdemeanors punishable by fine not to exceed five hundred dollars, or imprisonment not to exceed three months, or both such fine and imprisonment.

§ 11. The common council shall prescribe the duties of all officers whose duties are not defined in this act, or in any other law of this State, and it shall be the duty of the officers of the city gen-
367 erally to perform all such services as may be required by law, or the ordinances of the common council.

§ 12. The several officers under this charter shall receive for their services, out of the city treasury, a compensation to be fixed by ordinance, not to exceed four thousand dollars a year; provided, that the treasurer shall receive, in lieu of salary, not to exceed one-half of one per cent. on all moneys received, paid out, and accounted for by him, and the collector not to exceed one per cent. on all moneys collected and paid over.

§ 13. The compensation of the mayor's and recorder's clerks shall not exceed two thousand dollars each per annum, nor shall that of

the clerk of either board of aldermen exceed twelve hundred dollars, and no officer shall be entitled to any clerk or deputy unless as herein expressly provided.

§ 14. The members of the common council shall receive no compensation for their services.

§ 15. If any person elected to a city office shall remove from the city, absent himself therefrom for more than thirty days, or shall fail to qualify within ten days after his election, his office shall be deemed vacant.

368 § 16. The officers elective under this charter shall continue in office for one year, or until their successors are qualified; but any officer may be removed for misconduct by impeachment.

§ 17. All officers or persons to whom the receipt or expenditure of the moneys or funds of the city shall be intrusted shall give security, in such amount as the common council may require, payable to the city, and subject to the approval of the mayor. Such bond shall be subject to the provisions of law concerning bonds of officers.

§ 18. All fees, costs, fines, perquisites, or emoluments for any services to be performed by any officer or person under this charter, or collected under any ordinance of the common council, shall be paid over every week by such officer or person into the city treasury, under oath; and no officer shall be entitled to receive his salary till he shall file his affidavit with the comptroller, that he has faithfully accounted for and paid over all moneys for which he is bound to account.

§ 19. For any violation of the tenth, eleventh, or seventeenth sections of article third, or of the eighth or eighteenth sections
369 of article fourth, or of the seventh section of article sixth of this chapter, the party so offending shall be deemed guilty of a misdemeanor, and on conviction thereof, may be punished by fine not to exceed five thousand dollars and imprisonment not to exceed one year.

§ 20. The officers of the present city government shall continue in office under this charter with such powers and duties as are herein prescribed until their successors are qualified; and nothing herein contained shall be construed to release any persons heretofore holding office in said city from any personal liabilities which they may have incurred by their official acts.

Article V.

Streets and improvements.

§ 1. The mayor, street commissioners and assessors shall constitute a board of commissioners of assessments. When private property is taken for public purposes and the valuation of said commissioners is not satisfactory to the owner thereof, he may require that the matter be submitted to the jury before the superior court, and the value found by the jury, when confirmed by the
370 court, shall be the amount which the owner shall be bound to accept, and entitled to receive before the property is taken.

§ 2. Whenever the common council shall think it expedient to open, alter, or improve any street, or alley, or to improve any public grounds, notice thereof shall be given by publication for ten days in some daily paper. Should one-third of all the owners of the adjacent property protest against the proposed improvement, it shall not then be made. If no such protest be made, the common council shall proceed with such improvement, at least two-thirds of the expense of which shall be borne by the property adjacent.

§ 3. The assessment for such improvement shall be made by the commissioners named in section first, and shall be proportionate to the advantages respectively derived from such improvement.

§ 4. Should any person be dissatisfied with the assessment by said commissioners, he may appeal to the board of aldermen, whose decision shall be final.

§ 5. Whenever two-thirds of all the persons owning property on any street or land shall apply to the common council for any improvement thereof, the same shall be made on such conditions
371 as the common council may determine, said persons paying at least two-thirds of the expense of such improvement.

Article VI.

Miscellaneous provisions.

§ 1. The fiscal year of the city shall begin on the first day of July.

§ 2. Every ordinance of the common council shall embrace but one subject, and that shall be expressed in its title.

§ 3. The ordaining clause of the city ordinances shall be, "The people of the city of San Francisco do ordain as follows."

§ 4. Taxation shall be uniform throughout the city.

§ 5. Licenses shall be discriminating and proportionate to the amount of business.

§ 6. All sales or leases of property belonging to the city shall be by public auction.

§ 7. All contracts for work or supplies shall be let to the lowest bidder after notice given through the public newspapers, and no officer shall be interested in any contract connected with this department.

372 § 8. The common council shall have no power to grant exclusive privileges.

§ 9. The common council shall appoint no officers for weighing, measuring, gauging, culling, or inspecting any merchandise, produce, manufacture or commodity; but nothing in this section shall prevent their passing any ordinance necessary for protecting the public health.

§ 10. The common council shall have power to raise by tax any amount of money that they may deem expedient, whenever the ordinance for that purpose shall have been approved by the people.

§ 11. When any amendment to this charter shall have been agreed to by three-fourths of all of the members elected to each board, it may be submitted to the people at any general election; and if

approved by them it shall become a part of the charter. Said red dolment shall be published at least sixty days before said electi unless shall also be the duty of the common council to call a conven of delegates for the revision of this charter. Said convention sha meet on the first Monday of March, one thousand eight hundred and fifty-three, and shall consist of three members for each
373 ward. Should the charter as amended and adopted by said convention be approved by the people at any general election, it shall become the charter of the city of San Francisco—subject, however, to the approval of the legislature.

§ 12. The act entitled "An act to incorporate the city of San Francisco," passed April fifteenth, one thousand eight hundred and fifty, is hereby repealed.

8th. The act of the legislature of the State of California, approved March 11, 1858, known commonly as the act confirming the Van Ness ordinance, Statutes of California for 1858, p. 52 *et seq.*, and which is as follows:

An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city, approved March 11, 1858.

The people of the State of California, represented in the senate and assembly, do enact as follows:

SECTION 1. Whereas, the common council of the city of San Francisco passed an ordinance, approved by the mayor, on the twentieth day of June, A. D. one thousand eight hundred and fifty-five, which ordinance is in the words and figures following, to wit:

374 Number eight hundred and twenty-two.—Ordinance for the settlement and quieting of the land titles in the city of San Francisco.

The people of the city of San Francisco do ordain as follows:

§ 1. It shall be the duty of the mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit and behoof of the occupants or possessors thereof, according to their respective interests.

§ 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns forever; excepting the property known as the sl p property, and bounded on the north by Clay street, on the west by Davis street, on the
375 south by Sacramento street, and on the east by the water front. And excepting also, any piece or parcel of land

foot of [illegible] south, east or north of the water-lot front of the city of San
and con[illegible]co, as established by an act of the legislature of March
§ 12. sixth, A. D. one thousand eight hundred and fifty-one; pro-
this or[illegible]; such possession has been continued up to the time of the in-
repe[illegible]uction of this ordinance in the common council, or, if interrupted
[illegible]y an intruder or trespasser, has been, or may be, recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance, that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in possession of the landlord or lessor under whom they were so occupied or possessed. Provided, that all persons who hold title to lands within said limits by virtue of any grant made by any ayuntamiento, town council, alca-de or justice of the peace of the former pueblo of San Francisco, before the seventh day of July, one thousand eight hundred and forty-six; or grants to lots of land lying east of Larkin street and northeast of Johnson street, made by any ayuntamiento, town council, or alca-de of said pueblo, since that date, and before the incor-
376 poration of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered, or recorded in a proper book of record deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, one thousand eight hundred and fifty-five, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said land may be in the actual occupancy of persons holding the same adverse to the said grantees.

§ 3. The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name.

§ 4. The city, however, as a consideration annexed to the next two proceeding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets,
377 and sites for school-houses, city hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections.

§ 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnson street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation; and to assess, in the manner provided by the present or any existing charter of the city, upon the lands bounded on such streets, the whole expense of laying out, opening, grading and constructing the same; and payment of the costs of said improvements shall be deemed a

charge upon the lands mentioned in this section, to which the ... of San Francisco relinquishes her right and title by the second and third sections of this ordinance. dol-less

§ 6. The city shall also have the right to select and set apart, ... the lands west of Larkin street and southwest of Johnson str... as many lots not exceeding one hundred and thirty-seve... 378 and a half feet square each, as the mayor and common council may, by ordinance, determine to be necessary for sites for school-houses, hospitals, fire-engine houses, and other public establishments necessary and proper for the use of the corporation; and may lay out and reserve, upon the said lands, at convenient and suitable points and distances, public squares, which shall not embrace more than one block, corresponding in size with the adjoining blocks; provided, that the selection shall be made within six months from the time of the passage of this ordinance; and that the city shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out of the streets aforesaid, more than one-twentieth part of the land in the possession of any one person; and that such possessor shall voluntarily assent thereto; or, refusing to do so, shall not be entitled to the benefit of any concession contained in the second and third sections of this ordinance.

§ 7. The lots and land reserved for the use of the corporation, under the provisions of the next preceding section, shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in the 379 possession of the respective occupants as to make the apportionment as nearly equal as circumstances will admit.

§ 8. The selection of said lands and lots shall be made by a commission to consist of three persons, who shall be chosen by the common council, in joint convention, who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, acknowledged and recorded, in which deeds shall be specified, the uses for which they are granted, reserved, and set apart respectively.

§ 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any outstanding title to the said lands adverse to the said possessors.

§ 10. Application shall be made to the legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

§ 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute, to a final de- 380 termination, her claim now pe... ...ing before the United States land commission, for pueblo lands, for the several use, benefit, and behoof of the said possessors mentioned in section two, as to the lands by them so possessed, and for the proper use, benefit and be-

hoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

§ 12. That all ordinances, or parts of ordinances, conflicting with this ordinance, or any of its provisions, be and the same *is* hereby repealed.

Approved June twentieth, one thousand eight hundred and fifty-five.

S. P. WEBB, *Mayor.*

And whereas, the common council passed another ordinance, approved by the mayor of said city, September twenty-seventh, A. D. one thousand eight hundred and fifty-five, which last-mentioned ordinance is in the words and figures following, to wit:

Number eight hundred and forty-five.—Ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engines and school purposes, and for adopting the plan of streets in the western and southwestern portion of
381 the city, according to the provisions of ordinance number eight hundred and twenty-two, and confirmatory of said ordinance number eight hundred and twenty-two.

The people of the city of San Francisco do ordain as follows:

§ 1. Under and by virtue of the provisions of the ordinance of the common council, number eight hundred and twenty-two, entitled "An ordinance for the settlement and quieting of land titles in the city of San Francisco, approved June twentieth, one thousand eight hundred and fifty-five," the board of aldermen and board of assistant aldermen shall meet in joint convention at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section eight of said ordinance number eight hundred and twenty-two.

§ 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners, and with their concurrence, to furnish, by way of recommendation, to the common council, within one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the
382 city limits, west of Larkin and southwest of Johnson streets, upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city, under the provisions of the aforesaid ordinance number eight hundred and twenty-two; provided, that the compensation of said commissioners shall not exceed the sum of one hundred dollars each, payable when the common council may legally make an appropriation therefor.

§ 3. The said ordinance number eight hundred and twenty-two, referred to in the preceding section one, is hereby re-ordained, ratified, and confirmed in all its parts.

Approved September twenty-seventh, one thousand eight hundred and fifty-five.

JAMES VAN NESS, *Mayor.*

And whereas, in pursuance of the aforesaid ordinances, commissioners were appointed by the common council, who, in conjunction with the city surveyor of said city, agreed upon, and reported for the approval of the common council, a plan for the location of streets, public squares, and lots for public uses, to be laid out west of Larkin and southwest of Johnson streets, in said city, accompanied by a map of the same, which said plan and map was,
383 by the justices of the peace, exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved, and ratified by an order bearing date the sixteenth day of October, A. D. one thousand eight hundred and fifty-six, which is in the words and figures following to wit:

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city, in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnson streets.

Be it therefore enacted, That the within and before recited order and ordinances be, and the same are hereby ratified and confirmed; and all the land entered, or to be entered, in the United States land office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass, inure to, and be deemed to have immediately vested in the occupants thereof, for their several use
384 and benefit, according to their respective interests, in execution of the trust designated in an act of Congress, "An act for the relief of citizens of towns upon the public lands of the United States, under certain circumstances," approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress, entitled, "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein," and for other purposes, approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually, to all intents and purposes, as if they were public acts of the State legislature.

§ 2. That the grant or relinquishment of title made by the said city in favor of the several possessors, by sections to and three of the ordinance first above recited, shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually, and by name, and no further conveyance or other act shall be necessary to invest the said possessors with all the interests, title, rights, benefits, and advantages which the said order
385 and ordinances intend or purport to transfer or convey, ac-

cording to the true intent and meaning thereof; provided, that nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims, due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has, or may have, to any lands in said city and county of San Francisco.

9th. The ordinance of the common council of the city of San Francisco, known as the Van Ness ordinance (No. 822), and which is correctly set out in the first section of the said act of the legislature of California, approved March 11, 1858.

10th. Ordinance 845, which is mentioned and correctly set out in the said act of the said legislature of California, approved March 11, 1858.

11th. Minutes of board of alderman, No. 8, November 12, 1855, showing election of commissioners under the Van Ness ordinance, Messrs. Horace Hawes, Michael Hayes, and C. H. Gough, in the words as follows:

Appointment of Commissioners to Select Lands for the City under the Van Ness Ordinance, November 12th, 1855.

386 SAN FRANCISCO, *November 12th*, 1855.

Board of alderman.

Assistant Alderman Dow and Biedeman appeared as a committee from the board of assistant alderman, proposing to go into joint convention to elect three persons to fill the office of commissioners, created by section one of ordinance 345.

Proposition accepted, and the board adjourned to the room of the assistants.

Joint convention.

Present: Alderman Hopkins, Hathaway, Tewksbury, Greene, and Slocomb.

Assistant Alderman Wilson, Tobin, Peckham, Vandewater, Dow, Beideman, and Wells.

Nominations being in order, the following persons were named, viz., H. Hawes, M. Hayes, C. H. Gough, C. D. Carter, W. P. Jones, L. McLane, Jr., and R. H. Sinton. On proceeding to ballot, the result was as follows, viz: H. Hawes, 8 votes; W. P. Jones, 5 votes; L. McLane, Jr., 3 votes; M. Hayes, 7 votes; C. D. Carter, 3 votes; C. H. Gough, 7 votes; R. H. Sinton, 3 votes.

Messrs. Hawes, Hayes and Gough having received the highest number of votes were declared elected.

387 There being no other business, the convention dissolved, and the board of alderman withdrew.

12th. Ordinance 872, in words and figures as follows:

Extending the time for the commissioners appointed by section 8 of ordinance No. 822 to complete their labor.

The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance 822, for the purpose of selecting and setting apart lands for public purposes west of Larkin and south of Johnston streets be, and they are hereby granted until the twentieth day of March, 1856, to complete their labors.

HENRY J. WELLS,
President Board of Assistant Aldermen.
R. W. SLOCOMB,
President Board of Aldermen.

Approved December 21, 1855.

JAMES VAN NESS, *Mayor.*

13th. Ordinance in the following words and figures:

388 *Ordinance* 901.

Extending the time for the commissioners appointed by section 8 of ordinance No. 822 to complete their labors.

The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council under the provisions of ordinance No. 822, for the purpose of selecting and setting apart lands for public purposes west of Larkin and south of Johnston streets, be and they are hereby granted until the twentieth day of April, 1856, to complete their labors.

HENRY S. WELLS,
President of the Board of Assistant Aldermen.
J. M. TEWKSBURY,
President of the Board of Aldermen.

Approved April 7, 1856.

JAMES VAN NESS, *Mayor.*

14th. Ordinance extending time for commissioners to complete their labors to March 20, 1856, as follows:

Ordinance extending the time to March 20th, 1856, for the commissioners appointed by section 8 of ordinance No. 822 to complete their labors.

389 The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance 822, for the purpose of selecting and setting aside lands for public purposes west of Larkin and south of Johnston streets be, — are hereby granted until the 20th day of March, 1856, to complete their labors.

Approved December 21, 1855.

15th. Ordinance of April 7, 1856, extending time for commissioners to act to April 20, 1856, as follows:

Ordinance (further) extending the time to April 20th, 1856, for the commissioners appointed by sec. 8 of ordinance No. 822 to complete their labors, April 27th, 1856.

The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance No. 822, for the purpose of selection and setting apart lands for public purposes west
390 of Larkin street and south of Johnston street, be and they are hereby granted until the twentieth day of April, 1856, to complete their labors.

HENRY J. WELLS,
President of the Board of Assistant Aldermen.
J. M. TEWKSBURY,
President of the Board of Aldermen.

Approved April 7th, 1856.

JAMES VAN NESS, *Mayor.*

16th. Also, the preamble and order of the board of justices of peace, acting as a board of supe. visors, adopting the Van Ness map; adopted and approved, ratified October 16, 1856, of which the following is a copy:

Whereas, by an ordinance of the last common council of the city of San Francisco, approved September 27th, 1855, a commission of three persons was created to make reservations for public uses, and to lay out streets in that portion of the then incorporated limits of the said city lying west of Larkin street and southwest of Johnson street, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled: "An ordinance for the settlement and quieting of land titles," with instructions to said commission to report their action in the premises to the common council for its approval.

391 And whereas, said commission did discharge the duties assigned to it and made report thereof as directed, upon which report coming in the common council provided by joint resolution that a certain number of days should be allowed for all persons having any objections to said report, or any part thereof, to represent the same.

And whereas, said time expired and no objections, as the board is informed, were made, but still the last common council omitted to take any final action in the report of said commission.

And whereas, the board is advised and believes that it is proper for the public advantage that said report should be taken up and acted upon, so that doubts may be removed in regard to the location of the streets, and the places to be set apart for public squares and for the erection of public edifices in the portion of the city above referred to.

And whereas, express power is given to this board by the 39th

section of the act entitled: "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," to lay out and open new streets within the former
392 corporate limits of the city of San Francisco, and west of Larkin street and southwest of Johnson street, in accordance with the conditions of the ordinance of the common council of the said city, approved June 20th, 1855, entitled: "An ordinance for the settling and quieting of land titles," and as this board can see no objection to the plan known as Western addition reported by said committee.

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the Western addition, reported by the commission, created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city, in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes, in that portion of the then incorporated limits of said city, lying west of Larkin and southwest of Johnson streets.

Be it therefore enacted, That the within and before recited order and ordinances be and the same are hereby ratified and confirmed; and all the land entered, or to be entered, in the United States land office, and in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to, and be deemed to have immediately vested in the occupants thereof, for their several
393 use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress, entitled "An act for the relief of citizens of towns upon the public lands of the United States, under certain circumstances," approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually, to all intents and purposes, as if they were public acts of the State legislature.

§ 2. That the grant or relinquishment of title made by the said city in favor of the several possessors, by sections two and three of the ordinance first above recited, shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually, and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest,
394 title, benefits and advantages, which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; provided, that nothing in this

act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims, due or to become due this State against said city, or city and county; nor to affect or release to said city and county any title this State has, or may have to any lands in said city and county of San Francisco.

17th. Report of the surveyor and board of commissioners, appointed in pursuance of ordinance 845, hereinbefore set forth, made to the board of assistant aldermen, published April 19, 1856, which is as follows:

Report to the common council by the commissioners appointed as before, to select lands for the city, under the provisions of the Van Ness *Ness* ordinance, April 19th, 1856.

The following is the report of the surveyor and board of commissioners, made to the board of assistants, and published in the city official papers at the time, April 19th, 1856:

395 *Report of the Commissioners on the Survey of the Western Addition of the City.*

To the honorable common council of the city of San Francisco.

GENTLEMEN: The undersigned, commissioners appointed to select, under the provisions of ordinance No. 822, lots and squares for school, fire, hospital, and other public purposes in that portion of the city west of Larkin and southwest of Johnston streets, and to lay out the streets therein, beg leave to make the following report:

Your commissioners, after a patient and thorough examination of the land, have adopted the accompanying plan or map thereof, showing the streets so laid out, and the lots and squares selected for the above public purposes, and recommend its adoption as the official map of the portion of the city above mentioned. Your commissioners found that it was impossible to perform the work assigned them without a partial survey being first made; and as no provisions was made by the city for defraying the expenses of such survey, they became responsible for the hire of the chainmen, flagmen, and other expenses incidental to the survey, expecting to be reimbursed by subscription, which has been partially done. The annexed schedule, marked "A," shows the total amount of their disbursements in making the survey.

396 The number of school lots selected is twenty-eight (28); their size one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half feet (137½ ft. by 137½ ft.), except those located on the Potrero, which are one hundred feet by two hundred feet (100 ft. by 200 ft.). The number of lots for fire purposes is twenty-five (25); their size thirty feet by one hundred and thirty-seven and one-half feet (30 ft. by 137½ ft.), except those located on the Potrero, which are thirty feet by one hundred feet (30 ft. by 100 ft.). Six (6) squares or plazas are selected; size four

(4) blocks, containing about twelve acres each (12 a.), and 4 squares, size two (2) blocks, containing about five (5) acres each, and one lot for hospital, size two (2) blocks. Perhaps more lots and squares have been selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since, as a city enlarges, so do her wants.

Ordinance No. 822 gave your commissioners the power to take only the one-twentieth ($\frac{1}{20}$) of the land of one person for school, fire, hospital, and other public purposes. In a great many instances they found, in laying out the lots for such purposes, that, in order to place them at proper distances from each other, they would fall entirely upon the land of one person, or cover his house or
397 yard; and, moreover, in many cases, such persons did not own more than one block. In order, then, to avoid such difficulties, we were forced to locate some of the public lots and squares in places different from those originally designated.

Your commissioners also made personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city, whenever called upon, provided the city would deed to them her right and title to the balance of their claim. The time is past when it is necessary to support this course by argument. The city has pledged its faith by ordinance No. 822; the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it. Your commissioners would, therefore, recommend the appointment of two or three suitable persons with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title of the city to all parties in possession, as contemplated by ordinance No. 822.

All which is respectfully submitted.

April 19th, 1856.

MICHAEL HAYES,
C. H. GOUGH,
Commissioners.

JOHN J. HOFF,
City Surveyor.

398 In the board of assistant aldermen, April 21, 1856, said report was received, read, and ordered published, and laid over for further consideration.

18th. Ordinance of December 17, 1855, extending the time for commissioners to complete their work, by the board of aldermen, which is as follows:

The rules were suspended, and the following ordinance was submitted:

Extending the time for the commissioners appointed by section 8 of ordinance No. 822 to complete their labors.

The people of the city of San Francisco do ordain as follows:

SECTION 1. That the commissioners appointed by the common council, under the provisions of ordinance 822 for the purposes of selecting and setting aside lands for public purposes, west of Larkin and south of Johnston streets, be and they are hereby granted until the 20th day of March, 1856, to complete their labors.

Passed to a third reading and finally by following ayes: Cowie, Hopkins, Hathaway, Tewksbury, Greene and Slocomb.

19th. Proceedings of the board of assistant aldermen, April
399 21, 1856. Report of commissioners ordered published and laid over for further consideration.

"A report was received from the commissioners appointed by virtue of ordinance No. 822, to select lots and public squares for school, fire, hospital, and other purposes. On motion it was ordered published and laid over for subsequent consideration."

20th. Act of Congress of March 8, 1866, to quiet title to lands within the corporate limits of San Francisco, as follows:

Act of Congress approved March 8th, 1866, entitled:

An act to quiet the title to certain lands within the corporate limits of the city of San Francisco.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the circuit court of the United States for the northern district of California, entered on the eighteenth day of May, 1865, be and the same are hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city
400 to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: That all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: Provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination or adjustment thereof.

21st. The map mentioned in the said act of the legislature of California, approved March 11, 1858, as the map, "which said plan and map *was* by the justices of the peace, exercising the powers of

a board of supervisors of the city and county of San Francisco, adopted, approved and ratified by an order bearing date the 16th of October, A. D. 1856."

401 And which map was produced from the custody of the surveyor of the city and county of San Francisco, and which is certified as follows:

"For the location and dimensions of the streets to be laid within the city limits, west of Larkin and southwest of Johnston streets, with the lots of grounds selected and set apart for the several public uses as hereon designated, made, selected and presented for the approval of the common council, by the undersigned, city surveyor and commissioners, under and in pursuance of the provisions of an ordinance of the common council of the city of San Francisco, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855, and also an ordinance of the said common council, entitled 'Ordinance providing for selecting and designating public squares and reservations, for hospitals, fire-engine and school-houses, and other public purposes, and for adopting the plan of the streets in the western and southwestern portions of the city, according to the provisions of ordinance No. 822, and confirmatory of said ordinance No. 822,' approved September 27th, 1855.

C. H. GOUGH,
MICHAEL HAYES,
HORACE HAWES,
Commissioners.

JOHN J. HOFF,
City Surveyor."

402 And the portion of which affecting this controversy is as follows. For map, see page 232 A:

No other record exists or was offered in evidence at the trial concerning the dedication or reservation than those herein mentioned, saving and excepting such, if any, as results from the legislature of the State and of Congress.

22d. Resolution of the board of supervisors, No. 16274, new series, May 7, offered as authorizing action.

Resolution No. 16274 (*New Series*).

Resolved, That the city and county attorney be and he is hereby directed to report to this board the condition of any action or actions at law now pending for the opening or recovery of Lafayette park, and to commence such suit or suits in ejectment as may be proper against the party or parties in possession of any portion of said square, in the name of the city and county, so that possession of the whole of said square may be regained and the said square improved.

And the clerk is hereby directed to advertise this resolution as required by law.

In board of supervisors, San Francisco, May 7, 1883.
403 Adopted by the following vote: Ayes, Supervisors Sullivan, Reichenbach, Shirley, Burton, Smith, Pond, Griffin, Strother, Lewis, Ranken, James, Ashworth.

JOHN A. RUSSELL, *Clerk.*

It was then admitted that at the commencement of this action the defendants were in the possession of the lands described in the amended complaint, and the said land was situated west of Larkin street, and within the corporate limits of the city of San Francisco, as defined by the act of the legislature of California, incorporating said city, passed April 15, 1851, and formed a part of the tract of land laid down on the map mentioned in the act of the legislature of March 11, 1858, as adopted by the justices of the peace as Lafayette park.

The plaintiff here rested.

The defendants, to support the issues on their part, called as a witness GEORGE T. BOHEN, who testified:

That in November, 1863, he was the superintendent of streets of the city and county of San Francisco, and that the signature to the jurat of the complaint in the case in the 4th district court, No. 11029, of The People *v.* Holladay *et al.*, hereinafter set forth, was his genuine signature.

404 And then asked the witness as follows:

"Tell what connection you had with this action."

To this question the plaintiff objected as immaterial—when the defendants stated that they proposed to prove that 'he witness as superintendent of streets, together with John H. Saunders as city and county attorney, caused the said action to be brought. That the action was instituted and prosecuted under the direction and in the interest of the city and county of San Francisco.

To this evidence the plaintiff objected—that it was immaterial, and the testimony incompetent, that the record spoke for itself, and that the matter which was proposed to be put in evidence could not be shown by parol.

All of these objections were overruled, to which plaintiff at the time excepted, and the testimony of said Bohen and of E. D. Sawyer, the latter the judge who presided at the trial, was then heard to the effect that the suit was instituted at the request of said Bohen, who then was superintendent of streets, who then acted as such, and that the people were represented by John H. Saunders, then attorney and counsellor of the city of San Francisco, and on the trial the
405 question of dedication was therein tried and decided for defendants.

To all this testimony as offered the plaintiff objected upon the ground that the testimony was immaterial, incompetent and inadmissible, for the reason that the record spoke for itself, and no addition thereto or diminution therefrom can be made by parol.

These objections were overruled by the court. The testimony — admitted, to which the plaintiff at the time excepted.

The defendants then offered in evidence, from the custody of the clerk of this court, the judgment-roll in said action.

The People of the State, etc., *vs.* S. W. Holladay and others. No. 11029 of the former 4th district court—

Consisting of the complaint and jurat, filed November 16, 1863.

The summons and the return thereon.

The answer filed Nov. 27, 1863.

The stipulation for judgment filed Feb. 19, 1876.

The judgment dated Feb. 19, 1876.

406 Minute order submitting cause dated April 21, 1864. Minute Book G, p. 287.

Order, July 11, 1864.

The said record and documents are as follows:

In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA at the Relation of GEORGE T. BOHEN
vs.
SAMUEL W. HOLLADAY, JOHN DOE, and RICHARD ROE and A. P. ANDERSON.

The People of the State of California (by Frank M. Pixley, attorney general of the State of California) at the relation of George T. Bohen, a citizen of the United States and a citizen and tax-payer of the city and county of San Francisco, complaining, allege:

That a certain piece or parcel of land situate in the city and county of San Francisco, State California, and within the corporate limits thereof was heretofore by the lawful owner and pro-
407 prietor thereof lawfully dedicated to and accepted by the public as a public plaza or square, and is and always since has been taken, recognized and marked and laid down upon the official map and plan of said city and county as a public square or plaza as aforesaid.

Said plaza or square being known and laid down on said map and plan as "Lafayette square," and described as follows: All that certain piece or parcel of land lying and being in said city and county of San Francisco, bounded on the north by Washington street; on the south by Sacramento street; on the east by Gough street; and on the west by Laguna street.

That said square or plaza is valuable for the purpose aforesaid, and with other public squares and plazas in said city were intended *and* to add to the comfort, convenience and health of the citizens resident in or visiting said city and county.

That the defendants have threatened to erect and construct, and have actually commenced to erect and construct fences and other permanent improvements directly within and upon said public square or plaza, which said purpose and threatening, if pursued and

carried out, will greatly and irremediably interfere with and
408 hinder the use and enjoyment by the public, and the citizens of the said city and county, of said public square or plaza, as aforesaid.

That the relator is a resident, property-holder, and tax-payer of said city and county, and that he and many other tax-payers and residents of said city and county will be greatly and irremediably prejudiced by said threatened and attempted obstructions of said public square or plaza, if the same should be carried out and consummated, and that they and the people of this State are remediless, except by the order and decree of a court of chancery, where matters of this sort are properly and exclusively determinable.

Wherefore, the People of the State of California, by said attorney general, at the relation aforesaid, pray that defendants, their agents, workmen, servants and attorneys, may be enjoined from erecting or constructing upon said public square or plaza any fences or other works or obstructions upon said square, and from digging upon or otherwise altering the same or any part thereof; and that defendants be decreed and ordered to remove, at their own cost and expense, all such posts, fences, or other improvements or obstructions as they may have placed upon said square or plaza heretofore,
409 for the costs of suit, and such other and further judgment, order and relief as may be proper in the premises.

FRANK M. PIXLEY,
Attorney General.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

George T. Bohen, the above-named relator, being first duly sworn, deposes and says: That he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

GEO. T. BOHEN.

Subscribed and sworn to before me this 16th day of November, A. D. 1863.

JAS. E. ASHCOM,
Dep. Co. Cl'k.

(Endorsed:) Filed November 16, 1863. Wm. Loewy, cl'k, p'r Jas. E. Ashcom, D. C.

410 In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex Relation* GEORGE T. BOHEN
vs.
SAMUEL W. HOLLADAY *et al.*

Summons.

Action brought in the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco and the complaint filed in said city and county of San Francisco in the office of the clerk of said district court.

The People of the State of California send greeting to Samuel Holladay, John Doe, and Richard Roe and A. P. Anderson, defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the fourth judicial district of the State of California, in and for the city
411 and county of San Francisco, and to answer the complaint filed therein (a copy of which accompanies this summons) within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but within this judicial district, within twenty days; or, if served out of said district, then within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain an injunction restraining the defendants, their agents, workmen, servants and attorneys, from erecting or constructing upon "Lafayette square" (particularly described in the complaint) any fences, or other works or obstructions upon said square, and from digging upon said square, and from digging upon or otherwise altering the same or any part thereof; and that defendants be decreed and ordered to remove at their own cost and expense, all such posts, fences, or other improvements or obstructions, as they may have placed upon said square or plaza heretofore, for costs of suit, and such other or further judgment, order and relief as may be proper in the premises.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

412 Given under my hand and the seal of the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco, this 16th day of November, in the year of our Lord one thousand eight hundred and sixty-three.

[SEAL OF COURT.]

WM. LOEWY, *Clerk*,
Per L. J. LEE,
Deputy Clerk.

(*Notice of Appearance.*)

I hereby accept service and enter appearance for H. P. Herrick, sued by the name of John Doe, and also for the within-named defendant, A. P. Anderson.

November 16, 1863.

S. W. HOLLADAY,
Att'y for Himself and Herrick and Anderson, Def'ts.

(*Sheriff's Return.*)

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 16th day of November, A. D. 1863, and personally served the same, on the 16th day of November, A. D. 1863, upon Samuel W. Holladay, one of the within defendants, by delivering to the said defend-
413 ant, personally, in the city and county of San Francisco, a copy of said summons, attached — a certified copy of the complaint.

Dated San Francisco, this 17th day of November, A. D. 1863.

JOHN S. ELLIS, *Sheriff*,
By HENRY L. DAVIS,
Under Sheriff.

(Endorsed:) Filed this 30th day of November, A. D. 1863. Wm. Loewy, clerk, by L. J. Lee, deputy clerk.

Answer.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

And for answer to the complaint herein, the said defendants, S. W. Holladay, Hazard P. Herrick, therein called by the fictitious name of John Doe, and A. P. Anderson, admit, allege, and deny as follows:

First. In answer to the first allegation in the complaint, wherein it is alleged that the land therein mentioned was, by the lawful owner and proprietor thereof, lawfully dedicated to the public, these defendants deny the same, and say that the said allegation is
414 not true, but that the truth and facts concerning the alleged matter are as hereinafter stated.

Defendants deny that said square or plaza was ever in any manner, as such square or plaza, accepted by the public, and they say that the said allegation is not true, but that the truth and facts concerning the same are as hereinafter stated.

Defendants deny the allegation in the complaint, wherein it is

stated that the construction of said fence by defendants will hinder the public from the use of the alleged square or plaza. Defendants allege that the public have no right to the use of said land, so far as the part thereof hereinafter described is concerned, either with or without the construction of said fence.

Defendants deny that they have threatened, intended, or attempted to fence in or upon the *the* whole of the land described in the complaint, but only the part thereof hereinafter mentioned and particularly described.

And the defendants, further answering, aver that the full and true statement of all the facts of the case is as follows:

First. That the defendant, S. W. Holladay, is the owner of the land hereinafter described, and he contracted with the de-
415 fendant, H. P. Herrick, to fence the same by subdivision fences, dividing lots from streets and lots, and the said H. P. Herrick employed the defendant, A. P. Anderson, a laborer, to dig the post-holes and erect the fences on the ground, the material for which the said Herrick, contractor as aforesaid, had furnished and placed on the lots, and the said defendants, Herrick and Anderson, have no other, further or different interest in connection with the matter than as contractor and laborer as aforesaid, and they pray that the said S. W. Holladay may be permitted to conduct and defend this action solely and on his own account, and at his own expense, these defendants hereby consenting and agreeing to abide the resulting of the adjudication as to him.

And for further and special answer, defendants aver that, in the summer of the year of our Lord 1854, Philip W. Shepheard, Samuel W. Holladay, defendants herein, and Charles R. Saunders, were in the actual and exclusive possession, occupation, use and enjoyment of all the following-described tract or parcel of land, in the city and county of San Francisco, commencing at a point midway between Clay and Washington streets, 60 feet and 7 inches east of what is now called Van Ness avenue, running thence west parallel and midway between Clay and Washington streets, in their
416 present direction, to the top of the high hill, and to a point 44 feet 1 inch east of what is now known as Octavia street, and midway between Clay and Washington streets; running thence south six degrees west to a point midway between Clay and Sacramento streets, which point is also 33 feet 8 inches west of the east line of what is now Octavia street; running thence east parallel and midway between Clay and Washington streets, to a point 60 feet and 7 inches east of the east line of what is now Van Ness avenue; thence north in a line parallel with what is now Van Ness avenue, and 60 feet and 7 inches east of the east line thereof to the place of beginning.

The parties last above named, in the spring of the year 1854, closed the land last above described with a strong and substantial board fence, on the line last above described.

That the said Shepheard, Holladay and Saunders, some of them all the time, and all of them some of the time, continuously and without interruption, from the month of November, A. D. 1854,

to the present time, have lived, dwelt and resided within and upon the said tract of land last above described, and as tenants in common they, the said Shepheard, Holladay and Saunders, were
417 in the actual and exclusive possession of said tract of land and the whole thereof, on and for some three months prior to the first day of January, A. D. 1855, which possession was continued and without interruption from any one up to and long after the 20th day of June, A. D. 1855, and after the introduction of the Van Ness ordinance into the common council of the city of San Francisco.

That in the month of June, A. D. 1855, the common council of the city of San Francisco passed an ordinance, which was approved by the mayor of said city on the 20th day of the same month, numbered 822, entitled "An ordinance for the settlement and quieting of land titles in the city of San Francisco," commonly called the Van Ness ordinance, whereby said city of San Francisco did relinquish and grant all the right, title, and claim of said city to the land above described to the said Shepheard, Holladay and Saunders, reserving the right to lay out and open streets through the same, and reserving also from said relinquishment and grant the right to select and set apart from the lands west of Larkin street and southwest from Johnson (now called Ninth street) whereof the lands above described is a part, certain lots not exceeding 137½ feet square each, for certain public purposes; and it was by said ordinance further provided that the city "may lay out and reserve upon said lands, at suitable and convenient points and dis-
418 tances, public squares, which shall not embrace more than one block, corresponding in size to the adjoining blocks," and it was in and by said ordinance further "provided that the city shall not, without due compensation, occupy, for purposes mentioned in this section (meaning for public squares, among other things,) after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person."

That said land and the whole thereof is situated within the corporate limits of the city of San Francisco, as defined by the act to incorporate said city, passed April 15, 1851, and always was and is above the natural high-water mark of the bay of San Francisco.

That after the passage of the Van Ness ordinance, certain commissioners appointed by the said city of San Francisco, proceeded to lay out and designate streets, school lots and public squares upon a map or plan of that part of the city west of Larkin street and southwest from Johnston street, including the tract of land herein described, while said parties were so in the actual possession of the land above described.

That amongst other public squares so marked on said map by said commissioners is the tract of land described in the complaint and therein called Lafayette square, and which contrary to
419 the terms of said ordinance embraces four blocks corresponding in size to the adjoining blocks, instead of one block only as prescribed by said ordinance.

That the tract of land above described, and in the possession of

said Shepheard, Holladay and Saunders, after laying out streets through the same according to the said map, consisted in quantity — 18 fifty-vara lots of 137½ feet square each and a fraction of one lot over.

That said land called Lafayette square embraces in quantity six of said 18 fifty-vara lots or one-third of the whole tract in the possession of said Shepheard, Holladay and Saunders, as aforesaid, after laying out the streets, and the said laying out of so much of their said lands on the map for a public square was without consultation with them, and without their consent, while at the same time they were and always have been ready and willing to relinquish and appropriate one-twentieth of said land for the purposes mentioned in and according to the provisions of said ordinance.

That in the year 1857 the said Chas. R. Saunders sold and conveyed by deed all his right, title and interest in said land to this defendant S. W. Holladay.

420 That since that time the said P. W. Shepheard and S. W. Holladay continued in possession thereof as owners and tenants in common, till about the year 1861, when they partitioned said land between themselves.

That as the result of that partition and conveyances between the said Shepheard and S. W. Holladay, the latter became the sole owner of all their former interest, title and possession in the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets, which six lots comprise about one-third of all and entire of the said tract of land above described, which tract embraced all the land in their possession to which said ordinance applied.

That said defendants Shepheard, Holladay and Saunders have always been ready and willing and said Holladay their successor in interest in and to the land in said tract west of Gough street, now is ready and willing, and has long prior to the commencement of this suit duly and regularly offered in writing to the proper authorities of the city of San Francisco, to convey without cost for the use and purpose of a public square, at the — so designated a proportion of said land equal to one-twentieth of the entire claim or tract above described, and to convey all his interest therein on receiving

421 due compensation therefor. And the defendant now hereby offers so to convey said one-twentieth for the purposes aforesaid, as soon as this court, or any other competent authority, shall designate what is that one-twentieth and where it shall be located, and to convey the balance on receiving due compensation therefor.

And the defendants, further answering, say that they had intended and commenced to erect a fence or fences to enclose by subdivisions of the blocks three of those fifty-vara lots on the south side of Clay street, and between Gough and Octavia streets, which are embraced within said tract of land first above described, and comprising a part of the alleged public square, and also one other fifty-vara lot on the north side of Clay street, and west of Gough street, composing the northwest corner of Clay and Gough streets, and these defendants did "not," nor did either of them commence, attempt or threaten

fencing in or upon any other land than that embraced within the limits of the tract first above described.

Defendants aver that neither the public nor the city of San Francisco ever had the possession or occupation of said tract of land or any part thereof, since the year 1854, but on the contrary the same was in 1854, and ever since has been in the exclusive possession of said Shepheard, Holladay and Saunders, and those claiming
422 through or under them by fences, building and actual occupancy and dwelling thereon.

Wherefore, defendants demand judgment that the complaint be dismissed with costs and for such other and further order or relief in the premises as may appear just and equitable.

S. W. HOLLADAY,
For Himself Personally and Attorney for Defendants Herrick and Anderson.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

S. W. Holladay, one of the defendants, being sworn, says that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

S. W. HOLLADAY.

Subscribed and sworn to on this 27th day of November, A. D. 1863, before me—

[SEAL.] W. O. ANDERSON,
Notary Public.

(*Admission of Service.*)

Due service of a copy of the foregoing answer is hereby acknowledged.

423 (Endorsed:) Filed this 27th day of November, A. D. 1863. Wm. Loewy, clerk, per L. J. Lee, deputy clerk.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BOHEN }
vs. }
HOLLADAY. }

Stipulation as to Findings and Judgment.

This cause having been heretofore tried, argued and submitted to the court sitting without a jury, a jury having been regularly waived and a decision herein having been subsequently announced by the court in favor of the defendants, upon all the issues in the cause with an order that findings be prepared in favor of the defendants and against the plaintiffs, and that the injunction therein issued be

dissolved, it is now hereby stipulated that written findings be and they are hereby waived, and that judgment be entered herein against the plaintiffs and in favor of the defendants in accordance with the decision of the court, and for so much of the land described in the complaint as was claimed by and in possession of the defendants at the time of the commencement of this suit and claimed and
424 described in the answer and no more; that is to say, "the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets," which lots are otherwise bounded and described as follows:

First. On the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the south by Clay street; and on the west by Octavia street. That as to the land last above described under the heads "first "and "second," it be adjudged that the defendant Samuel W. Holladay was, from the month of February, A. D. 1854, in the actual use, occupation and possession of the same as the owner thereof as against the plaintiffs, and so continued down to the time of the commencement and trial of this suit with his fences and improvements thereon, and that the said land never was nor has been by the lawful owner or proprietor thereof lawfully or in any manner dedicated to or accepted by the public as a public square or plaza, or for any public use, but that the same was all the time and is the private property and in the actual and
425 lawful possession of the defendant S. W. Holladay, free and clear from any dedication to public uses whatsoever.

That the defendants, Hazard P. Herrick (who in the complaint is called by the fictitious name of John Doe) and A. P. Anderson had not at the time of the commencement of this suit or at any other time any right in or claim to any of the premises, except as servants or workmen under and in the employ of defendant Holladay.

That the said defendant S. W. Holladay has not nor has he had at any time any right or title in or to any part of the premises described in the complaint, except the six fifty-vara lots mentioned in his answer, embraces in the parcels "first" and "second," last hereinabove described.

That no costs be taxed or charged herein.

July 18th, 1864.

FRANK M. PIXLEY,
Attorney for Plaintiff.
S. W. HOLLADAY,
Attorney for Defendants.

(Endorsed:) Filed February 19th, 1876. Thos. H. Reynolds, clerk; Wm. Ledlie, deputy clerk.

426 (Title of Court and Cause.)

IN PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

Judgment.

This case having come on regularly for trial before the court without a jury, a trial by jury having been heretofore expressly waived by the parties in open court, the cause was tried by the court sitting without a jury; and witnesses for the respective parties having been duly sworn and examined, and certain documentary evidence having been read in evidence, and the cause duly submitted to the court upon briefs of the respective counsel,

And after the consideration thereof, the court having afterwards, on the eleventh day of July, 1864, rendered its decision thereon upon all the issues against the plaintiffs and in favor of the defendants, and ordered the injunction theretofore issued in the cause against the defendants to be dissolved and directed in said order counsel to draw findings;

And the counsel herein having, by their stipulation in writing filed herein, expressly waived written findings, and consented that judgment be entered without written findings, pursuant to
427 the order and decision of the court, it is now, therefore, by the consideration of the court, ordered, adjudged and decreed that the plaintiff take nothing by this action; but that the defendant Samuel W. Holladay was, at the time of the commencement of this suit, and is, in the true and lawful possession as the owner thereof, of so much of the land and premises described in the complaint as is claimed and described in his answer as "the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets," which lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

First. On the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

That as to said parcels of land last above described as "first" and "second," it is adjudged and decreed that the defendant Samuel W. Holladay was, from the month of February, 1854, in the
428 actual use, occupation and possession of the same as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon, and that the said land never was, nor has been, by the lawful owner or proprietor thereof, lawfully nor in any way dedicated to, accepted, or used by the public as a public square or plaza, or for any public use, but that the same

was all that time, and is, the private property and in the actual and lawful possession of the defendant, Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant, Hazard P. Herrick (who in the complaint is called by the fictitious name of John Doe), and the defendant, A. P. Anderson, had not at the time of the commencement of this suit, or at any other time, any right or claim to any of the premises, except as servants and workmen under and in the employ of defendant Holladay; and it is further adjudged and decreed that the defendant, S. W. Holladay, has not nor has he had at any time prior to the time of the commencement of this suit, any right or title in or to the possession of any part of the premises described in the complaint, consisting of four blocks, bounded
429 by Washington, Gough, Sacramento and Laguna streets, except the six fifty-vara lots mentioned in his answer, and embraced in the parcels "first" and "second" hereinabove described.

Feb'y 19th, 1876.

R. F. MORRISON, *Judge.*

Decree recorded February 23d, 1876, Book M, page 79.

(Endorsed:) Filed Feb'y 19th, 1876. Thos. H. Reynolds, clerk; Wm. Ledlie, dep. clerk.

Minute, Order Submitting Cause.

TUESDAY, *April 21st*, 1864.

(Title of Court and Cause.)

PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

This cause came on regularly for trial, in its order upon the calendar, Mr. Saunders appearing as attorney for plaintiff, and Mr. Holladay as attorney for the defendants, and a trial by jury having been expressly waived by parties in open court, the cause was tried by the court, sitting without a jury. Whereupon, Charles H. Gough, a witness for the plaintiff, being duly sworn and examined, and after reading certain documentary evidence, the testimony closed,
430 and the case was submitted to the court, without argument, upon briefs to be filed.

Minute Book "G," p. 287.

Minute, Order.

MONDAY, *July 11th*, 1864.

(Title of Court and Cause.)

PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

This cause, heretofore tried by the court, sitting without a jury, and submitted for consideration and decision, having been duly considered: It is ordered by the court that a finding be drawn herein in favor of the defendants and against the plaintiff, and that the injunction heretofore issued herein be and the same is hereby dissolved—counsel to draw finding.

Minute Book "G," p. 382.

Before the court passed upon the offer, the plaintiff called the defendant S. W. Holladay as a witness, asked him whether the stipulation for judgment offered in evidence was in fact signed at the time it bore date, July 18, 1864, or February 19, 1876.

To this question all the defendants objected as immaterial.

431 The court directed the question to be answered, and at this point, before the question was answered, the court permitted the defendants to withdraw from their offer the said stipulation, and plaintiffs excepted to the said permission.

To the offer thus modified the plaintiff objected:

(*a.*) That the record offered is not the whole judgment-roll, that it is not a record between the city and county of San Francisco and the defendants, or any of them, that the issue in the record was joined in November, 1863, and—

(*b.*) That the title became vested in the city in trust for the people on July 1, 1864, and that, therefore, the judgment in the case would be inoperative as an estoppel, and—

(*c.*) That it affirmatively appears that at the time of the institution of the action, the title to the premises was in the United States, and the attorney general of California had no authority to deal therewith, or submit the same for adjudication thereon by any court.

These objections were by the court overruled and the evidence admitted, to which at the time the plaintiff excepted.

432 The defendants then offered in evidence the judgment-roll in case No. 11963, fourth district court, S. W. Holladay *vs.* The City and County of San Francisco, which is as follows:

In the District Court of the Fourth Judicial Dist. of the State of California in and for the City and County of San Francisco.

SAMUEL W. HOLLADAY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendants.

Complaint.

The above-named plaintiff complains of the above-named defendant- and for cause of action plaintiff alleges that he is the owner in fee-simple absolute and in possession of all the following-described land, situated within said city and county:

First. Commencing where the southerly line of Clay street intersects the west line of Gough street; thence running westwardly along the southerly line of Clay street four hundred and
433 twelve and a half (412½) feet to the easterly line of Octavia street; thence southwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, more or less, to a point midway between Clay and Sacramento streets; thence — right angles eastwardly parallel with and midway between Clay and Sacramento streets four hundred and twelve and a half (412½) feet to the west line of Gough street; thence northwardly along the last-named line one hundred and thirty-seven and a half (137½) feet, more or less, to the point of beginning.

Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence northwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet to a point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay and Washington streets four hundred and twelve and a half (412½) feet to the west line of Gough street; thence south-
434 wardly along the last-named line one hundred and thirty-seven and a half (137½) feet to the place of beginning.

That the municipal corporation called The City and County of San Francisco, the defendant herein, claims or pretends to have some estate, right, title or interest in said land adverse to this plaintiff, which claim is false and groundless in law and equity; that said claim is a cloud upon plaintiff's title to said land and an injury and prejudice to plaintiff, who now brings this suit for the purpose of determining such adverse claim against defendant and in favor of plaintiff.

Wherefore plaintiff prays for the judgment of this court that the said defendant have no right, title or interest in the above-described land or any part thereof, and for such other and further relief in the premises as may be just, and costs of suit.

S. W. HOLLADAY,
Plaintiff in Pro. Per.

(Endorsed:) Filed this 17th day of December, A. D. 1864. Wm. Loewy, clerk, per L. J. Lee, deputy clerk.

435 In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

SAMUEL W. HOLLADAY, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

Summons.

Action brought in the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The People of the State of California send greeting to the City and County of San Francisco, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed
436 therein, within ten days, (exclusive of the day of service) after the service on you of this summons—if served within this county, or, if served out of this county, but in this district, within twenty days; otherwise, within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a decree that the title of plaintiff be quieted and confirmed in and to certain pieces or parcels of land situate in the city and county of San Francisco and particularly described in plaintiff's complaint, that all adverse claims of defendant in and to said premises be declared false and groundless, and that said defendant be adjudged to have no right, title or interest therein or general relief.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded therein.

Given under my hand and seal of the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, this 20th day of December, in the year of our Lord one thousand eight hundred and sixty-four.

(50-ct. int. rev. stamp, cancelled.)

WM. LOEWY, *Clerk*,
Per JAS. E. ASHCOM,
Deputy Clerk.

437 OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 21st day of December, A. D. 1864, and personally served the same on

the 22d day of December, A. D. 1864, upon The City and County of San Francisco, the within-named defendant, by delivering to H. P. Coon, mayor of said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a certified copy of the complaint in said action therein named.

Dated at San Francisco, this 22d day of December, 1864.

HENRY L. D. DAVIS, *Sheriff*,
By GEORGE CHILDS,
Deputy Sheriff.

(Endorsed:) Filed 28th December, 1864. Wm. Loewy, clerk, by L. J. Lee, deputy clerk.

(Title of Court and Cause.)

HOLLADAY
vs.
SAN FRANCISCO.

Answer.

The above-named defendant, The City and County of San
438 Francisco, by her attorney, John H. Saunders, for answer to the complaint of the above-named plaintiff herein says:

That she denies each and every of the allegations in the said complaint contained.

Wherefore defendant prays to be hence dismissed with costs.

Dated San Francisco, December 30th, 1864.

JOHN H. SAUNDERS,
Attorney for Defendants.

(Endorsed:) Filed Dec. 31, 1864. Wm. Loewy, clerk, per Jas E. Ashcom, deputy clerk.

(Title of Court and Cause.)

HOLLADAY
vs.
SAN FRANCISCO.

Findings.

This cause came on regularly for trial before the court, without a jury, on the twenty-seventh day of September, A. D. 1865, when the plaintiff appeared in proper person, on his own behalf, and the defendant, the municipal corporation called The City and County of San Francisco, appeared by John H. Saunders, the city and county attorney, and John W. Dwinelle, Esq., of counsel, and the
439 respective parties having duly introduced and submitted their proofs, and the court having heard the arguments of the respective counsel thereon and considered the law and the evidence in the case, now decides and finds as follows:

1st. That the land described in the complaint is a part of the land which pertained to the town or pueblo which existed under the laws of Mexico prior to the year 1840, and which then composed what is the present site of the city and county of San Francisco.

2nd. That the defendant herein has succeeded through the former corporation, called the city of San Francisco, to all the right, title and interest of the former pueblo or town and city aforesaid, except such interests as have been in the meantime alienated or disposed of by the former pueblo or city, defendant's predecessors.

3d. That in the year 1852 the then city of San Francisco (successor in interest to said former pueblo, and legal predecessor to the present defendant), in due form presented her petition or claim for confirmation to a certain tract of land, including the premises in question, to the board of land commissioners, organized and acting under the law of Congress entitled "An act to ascertain and
440 settle private land claims in the State of California," approved March 3rd, 1851, wherein said claim was confirmed to the said city by said board of land commissioners, and afterwards, to wit, on the 18th day of May, A. D. 1865, the said claim of said city for confirmation was finally confirmed by the circuit court of the United States for the district of California, the said cause having in the meantime been duly transferred, by and in pursuance of the laws of Congress, to the court last named, which, at the time, was legally invested with jurisdiction to hear and determine the matter of said claim for confirmation.

4th. That the land described in the complaint is a portion of a larger tract, as existing in the year 1854, and defined and enclosed by substantial fences, bounding it on the north by a line midway between Washington and Clay streets; on the south by a line midway between Clay and Sacramento streets; on the east by what is now Van Ness avenue, and on the west by what is now the east line of Octavia street, comprising in all eighteen fifty-vara lots, excluding the street called Clay street, which has since been extended, running east and west through the centre of said tract and other streets, to wit, Franklin and Gough streets, which have since been laid out and run north and south through said tract.

441 That during the summer and fall of the year 1854, the plaintiff, and Philip W. Shepheard and Charles R. Saunders, his then cotenants, enclosed said tract, according to the above mentioned boundaries, by a substantial fence of posts and boards, and built several substantial buildings therein, and exclusively claimed, used and occupied said land and the whole thereof, for the purpose of a dwelling-place, cultivation and other useful and substantial purposes, which use and occupation have continued by the plaintiff and his cotenants therein from the year 1854, continuously down to the time of the commencement of this suit.

5th. That prior to the commencement of this suit, the plaintiff, by regular deeds of conveyance, derived from his said cotenants, Shepheard and Saunders, all their right, title and interest in and to the land described in the complaint, and the whole thereof, and at the time of the commencement of this suit said plaintiff was in the

actual and exclusive possession and occupation of all the land described in the complaint.

That on or about the 20th day of May, A. D. 1855, an ordinance was introduced into the common council of the city of San Francisco for passage, which afterwards passed and was approved by
442 the mayor of said city, on the 20th day of June, A. D. 1855, which ordinance was thereafter known as and by the number 822, the same was entitled "Ordinance for the settlement and quieting of the land titles in the city of San Francisco," which ordinance is found printed in the statutes of this State for the year 1858, at page 52 and following.

That on the eighth day of August, A. D. 1855, the mayor of said city sent into the common council thereof a written communication, of which the following is a copy:

MAYOR'S OFFICE, *August 3d*, 1855.

To the common council.

GENTLEMEN: By the terms of the ordinance approved June 20th, 1855, entitled "An ordinance for the settling and quieting of land titles in the city of San Francisco," it is provided that a commission, consisting of three persons, shall be chosen by the common council, in joint convention, whose duty it shall be to select from the lands within the corporate limits of the city, and lying west of Larkin street and southwest of Johnson street, as many lots as the mayor and common council may, by ordinance, determine necessary
443 for public and municipal purposes, and that said selection shall be made within six months from the passage of the ordinance so approved June 20th, 1855.

The ordinance also declares that the city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnson street, and reserve the right, etc.

I would respectfully suggest to the common council the propriety and expediency of adopting at an early moment the necessary measures to ascertain the lines and boundaries of the streets contemplated to be laid out and opened in the, as yet, unsurveyed portion of the city; and also to determine by ordinance the number and dimensions of the lots to be selected for public and municipal purposes by the commission above referred to, and further to appoint said commission.

It will seen that until these preliminary steps are taken by the common council, it will be impossible to determine with accuracy which lands are destined for streets and other public uses, and which are to be retained by the proprietors as private domain. In
444 this condition of things, improvements in western and southwestern portions of the city will be greatly retarded, and the wholesome and general benefits expected to be derived from the passage of the ordinance for the settlement and quieting of land titles within the city will be correspondingly delayed.

JAMES VAN NESS, *Mayor.*

That afterwards said common council passed an ordinance on the same subject, known as ordinance number 845, which was approved by the mayor of said city, September 27th, A. D. 1855, and is found printed in the volume of statutes above mentioned, at page 55, which is hereby referred to as No. 3.

That on the 12th day of November, 1855, the board of aldermen and the board of assistant aldermen of said city met in joint convention, for the purpose mentioned in section 1 of said ordinance No. 845, and elected three commissioners as therein provided for, namely, Horace Hawes, Charles H. Gough and Michael Hayes.

That on the 21st day of December, 1855, ordinance No. 872 having passed by the respective boards, was on that day approved by the mayor, of which the following is a copy:

"SECTION 1. That the commissioners appointed by the
445 common council, under the provisions of ordinance No. 822, for the purpose of selecting and setting apart lands for public purposes, west of Larkin street and southwest of Johnson street, be and they are hereby granted until the 30th day of March, 1856, to complete their labors."

That afterwards ordinance No. 901 passed said common council, and was on the 7th day of April, 1856, approved by the mayor in the language of the last-named ordinance, except extending the time to the 20th day of April, A. D. 1856, for the purposes therein expressed.

That on the 19th day of April, 1856, a report, signed by two of said commissioners, namely, Michael Hayes and Charles H. Gough, and certified to by John T. Hoff, city surveyor, was made to said common council, of which report the following is a copy:

Report of the Commissioners on the Survey of the Western Addition of the City.

To the honorable common council of the city of San Francisco.

GENTLEMEN: The undersigned commissioners appointed to select, under the provisions of ordinance No. 822, lots and squares for school, fire, hospital and other public purposes, in that por-
446 tion of the city west of Larkin and southwest of Johnson streets, and to lay out the streets therein, beg leave to make the following report:

Your commissioners, after a patient and thorough examination of the land, have adopted the accompanying plan or map thereof, showing the streets so laid out and the lots and squares selected for the above public purposes, and recommend its adoption as the official map of the portion of the city above mentioned. Your commissioners found that it was impossible to perform the work assigned them without a partial survey being first made, and as no provision was made by the city for defraying the expenses of such survey, they became responsible for the hire of the chainmen, flagmen, and other expenses incidental to the survey, expecting to be reimbursed by subscription, which has been partially done. The annexed

schedule marked "A" shows the total amount of their disbursements in making the survey.

The number of school lots selected is twenty-eight (28); their size one hundred and thirty-seven and one-half feet by one hundred and thirty-seven and one-half feet (137½ ft. by 137½ ft.), except those located on the Potrero, which are one hundred feet by two hundred feet (100 ft. by 200 ft.). The number of lots for fire purposes
447 is twenty-five (25); their size thirty feet by one hundred and thirty-seven and one-half feet (30 ft. by 137½ ft.), except those located on the Potrero, which are thirty feet by one hundred feet (30 ft. by 100 ft.). Six (6) squares or plazas are selected; size four (4) blocks, containing about twelve acres each (12 a.), and four (4) squares, size two (2) blocks, containing about five (5) acres each, and one lot for hospital, size two (2) blocks. Perhaps more lots and squares have been selected than are necessary for the above purposes; yet the selection of the above number was deemed advantageous, since, as the city enlarges, so do her wants.

Ordinance No. 822 gave your commissioners the power to take only the one-twentieth ($\frac{1}{20}$) of the land of one person for school, fire, hospital and other public purposes. In a great many instances they found, in laying out the lots for such purposes, that in order to place them at proper distances from each other, they would fall entirely upon the land of one person, or cover his house or yard, and moreover, in many cases, such persons did not own more than one block. In order then to avoid such difficulties, we were forced to locate some of the public lots and squares in places different than those originally designated.

448 Your commissioners also made a personal inspection of all the lots and squares selected for public purposes, and ascertained from most of the owners thereof that they would deed the lots to the city, whenever called upon, provided, the city would deed to them her right and title to the balance of their claim. The time is passed when it is necessary to support this course by argument. The city has pledged its faith by ordinance No. 822; the measure has become part of the settled policy of the corporation, and yet the parties interested have not reaped the benefit of it. Your commissioners would therefore recommend the appointment of two or three suitable persons with authority to receive the deeds of the lots and squares selected for public purposes, and to deed the right and title of the city to all parties in possession as contemplated by ordinance No. 822.

All of which is respectfully submitted.

April 19th, 1856.

MICHAEL HAYES.
C. H. GOUGH.

JOHN T. HOFF,
City Surveyor.

That the map or plan referred to in said report is now in
449 the office of the city and county surveyor and the same bears

on its face a certificate signed by said commissioners, of which said certificate the following is a copy:

"City of San Francisco.

"For the location and dimensions of the streets to be laid out within the city limits west of Larkin street and southwest of Johnson street with the lots or grounds selected or set apart for the several public uses, as herein designated, made, selected, and presented for the approval of the common council by the undersigned city surveyor and commissioners, under and in pursuance of the provisions of an ordinance of the common council of the city of San Francisco, entitled:

"'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855; and also an ordinance of the said common council, entitled:

"Ordinance providing for selecting and designating public squares, and reservations for hospitals, fire-engine and school-houses, and other public purposes, and for adopting the plan of the streets in the western and southwestern portions of the city, according to the provisions of ordinance No. 822, and confirmatory of said
450 ordinance No. 822, approved September 27th, 1855.

C. H. GOUGH,
MICHAEL HAYES,
HORACE HAWES,
Commissioners.

JOHN T. HOFF,
City Surveyor."

This report was on the 21st day of April, A. D. 1856, received and read in the board of assistant aldermen and ordered published, and laid over for further consideration.

That the names of the streets on the part of said map, west of Larkin, and southwest of Johnson (now 9th) streets were not on said map at the time of said report, but the same have since been placed thereon from time to time by the city and county surveyors.

That the parcel of land intended by said commissioners as public squares are designated on said map by the following titles: Alta square, Alamo square, Hamilton square, Jefferson square, Lafayette park, Lobos square, which contain four blocks each of the size of the adjoining and surrounding blocks, besides the streets intersecting the same.

451 That the parcel on said map designated as "Hospital lot," contains $8\frac{65}{100}$ acres and was located upon the then possession of William Hart, and included about seven-eighths ($\frac{7}{8}$) of the parcel of land at the time actually possessed and occupied by him as his permanent homestead.

That the parcels of land mentioned by said commissioners in their report as having been by them selected for other public purposes than said plazas and the said hospital lot, bear no name or other designation on said map than a shading of color.

That the land described in the complaint in this action is situated within what is designated on said map as "Lafayette park," through the center of which runs Clay street, east and west and the street now called Octavia street, north and south.

That said Lafayette park, as laid out on said plan included one-third of the said tract of land above described, which was from the year 1854 to 1857 in the actual possession of the plaintiff and his then cotenants Shepheard and Saunders.

That on the 5th day of May, 1856, joint resolution No. 532 passed the common council of said city, of which the following is a copy:

452 "*Joint Resolution No. 532, Relative to Receiving Objections to the Adoption of the Plan of the Western Addition.*

Resolved, That a special committee of three from each board be appointed, to whom shall be referred the report of the city surveyor and commissioners, and that said committee be instructed to meet daily at the office of the city surveyor, between the hours of three and four o'clock p. m., for one week, for the purpose of receiving objections to the recommendations of said surveyor and commissioners, and that said committee shall advertise said meetings inviting all interested to present themselves and make known their desires—said committee to report at the next regular meeting of the board.

Passed the common council finally May 5th, 1856.

WM. H. STEVENS,
Clerk of the Common Council."

That on the 15th day of May, A. D. 1856, the committee appointed under said joint resolution No. 532 made a report to the common council, of which the following is a copy:

"To the honorable common council of the city of San Francisco:

453 Your committee appointed to attend at the city surveyor's office, and receive objections to the adoption of the report of the commissioners appointed to lay off the Western addition and the plan drawn by the same, beg leave to report—

That they have attended to this duty, and up to the present time have heard but of three complaints. In view of the large number of persons interested, your committee must regard this opposition as entitled to slight regard, and believe the plan meets with the general favor of the people of that part of the city.

They, therefore, recommend that the accompanying ordinance be adopted, which legalizes said plan, and makes provision for its being carried into effect.

Your committee would further recommend that the city surveyor be instructed to report to the common council the names proposed for the different streets and squares, and that the same be first con-

firmed, or other names adopted in their place, before they be officially placed on the map.

C. J. BARTLETT.
CHAS. WILSON.
WM. H. DOW.
CHAS. H. CORSER.
W. GREENE.
G. W. BRYANT."

454 And the following is a copy of the accompanying ordinance therein referred to, and reported by said committee for adoption:

"An ordinance providing for selecting and designating public squares for reservations or hospitals, fire-engine houses and other public purposes, and for adopting the plan of streets in the western and southwestern portion of the city, according to the provisions of ordinance No. 822, and confirmatory of said ordinance No. 822, passed September 27th, 1855, and authorizing the mayor to execute and deliver and accept and receive deeds in pursuance of the provisions of said ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' passed June 20th, 1855.

SECTION 1. The common council hereby approves the map and plan of streets to be laid out within the city limits, west of Larkin street and southwest of Johnson street, presented by the said commissioners, acting in conjunction with the city surveyor, and approves the elections made by said commissioners of lands and lots for public uses, in pursuance of the eighth section of said ordinance, entitled 'An ordinance for the settlement and quieting of land titles,' passed June 20th, 1855.

455 SEC. 2. The streets as represented on the map and plan referred to in the preceding section are hereby located and established as public streets, and the several lots and parcels of land by said commissioners selected as aforesaid are hereby dedicated, set apart, and reserved for the several uses as in their said report specified.

SEC. 3. The mayor is empowered to accept and receive, and cause to be duly recorded, the deeds of the city for the said lands and lots, according to section eight of the said ordinance No. 822, entitled 'An ordinance for the settlement and quieting of land titles in the city of San Francisco,' approved June 20th, 1855, and to execute and deliver, in the name of the city of San Francisco, deeds of release and quitclaim to the several possessors entitled thereto, according to the provisions of section second of said ordinance.

SEC. 4. The deeds so executed and delivered shall be signed as well by the grantee or grantees therein named as by the mayor, and the said grantee or grantees declaring his or their assent to the conditions of said ordinance 822, referred to in the preceding section,

shall, on his or their part, release and quitclaim to the city
456 of San Francisco all the rights, privileges, and reservations reserved to the city in and by the provisions and conditions of the ordinance last aforesaid.

SEC. 5. No person shall be entitled to receive a deed under the provisions of this ordinance until he shall have paid up all delinquent taxes and assessments levied by the city upon the land released to him, and shall also have executed, acknowledged and paid the expenses of recording the deed properly required of him for the lands or lots selected from his possession for public uses under the provisions of the ordinance hereinbefore mentioned.

SEC. 6. Aldermen —— ——, —— —— and assistant aldermen —— ——, —— —— are hereby appointed a joint committee from the board of aldermen and board of assistant aldermen, who are required to render their advice and assistance to the mayor in the execution of his duties under this ordinance, but shall not be required to sign the said deeds."

That on the 10th day of July, 1856, said common council became extinct by operation of the act approved April 10th, 1856, entitled

"An act to repeal the several charters of the city of San
457 Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof."

That in pursuance of the terms of said act, the then justices of the peace in and for the then county of San Francisco, on and after the first day of July, A. D. 1856, till the close of that year, assembled from time to time and discharged the duties of a board of supervisors of, in and for the city and county of San Francisco, created by said act of April 19th, 1856.

That on the 16th day of October, 1856, said justices of the peace assembled as a board of supervisors, adopted and entered on their minutes a preamble and resolution, of which the following is a copy:

"Whereas, by an ordinance of the last common council of the city of San Francisco, approved Sept. 27th, 1855, a commission of three persons was created to make reservations for public uses, and to lay out streets in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnson streets, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled 'An ordinance for the settlement and quieting of land titles,' with
458 the instructions to said commission to report their action in the premises to the common council for its approval;

And whereas, said commission did discharge the duties assigned to it, and made report thereof as directed, upon which report coming in, the common council provided by joint resolution that a certain number of days should be allowed for all persons having any objections to said report, or any part thereof, to represent the same;

And whereas, said time expired, and no objections, as the board is informed, were made; but still the last common council omitted to take any final action on the report of said commission;

And whereas, the board is advised and believes that it is proper for the public advantage that said report should be taken up and acted upon, so that doubts may be removed in regard to the location of the streets and places to be set apart for public squares, and for the erection of public edifices in the portion of the city above referred to;

And whereas, express power is given to this board, by the 39th section of the act entitled 'An act to repeal the several charters
459 of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' to lay out and open new streets within the former corporate limits of the city of San Francisco, and west of Larkin street and southwest of Johnson street, in accordance with the conditions of the ordinance of the common council of said city, approved June 20th, 1855, entitled 'An ordinance for the settling and quieting of land titles," and as this board can see no objection to the plan known as the Western addition, reported by said committee,

The board of supervisors of the city and county of San Francisco do ordain as follows:

SECTION 1. That the plan or map of the Western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnson streets.

Was adopted by the following vote: Ayes—Messrs. Ryan, Chamberlain and Castro. No—E. W. Smith."

460 That no other or further action was ever had by any of the municipal authorities of said city, or said city and county, upon the matters above mentioned, except as herein specially stated and recited.

That on the 11th day of March, A. D. 1858, the act of the legislature of this State, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," was approved.

As conclusions of law, from the foregoing facts, it is now found and decided by the court:

That the plaintiff was, at the time of the commencement of this suit, and still is, the owner of an undivided nineteen-twentieths ($\frac{19}{20}$ths) of all and singular the parcels of land described in the complaint, as a tenant in common with the defendant, The City and County of San Francisco, the owner of the other undivided one-twentieth part thereof, as a tenant in common therein with the plaintiff, Samuel W. Holladay.

The land and premises described in the complaint, and now hereby referred to, are bounded and described as follows, viz:

First. Commencing where the southerly line of Clay street
461 intersects the west line of Gough street; thence running westwardly along the southerly line of Clay street four hundred and twelve and a half (412½) feet of the easterly line of Octavia street; thence southerly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly, parallel with and midway between Clay and Sacramento streets four hundred and twelve and a half (412½) feet to the west line of Gough street; thence northwardly, along the last-named line, one hundred and thirty-seven and a half (137½) feet, more or less, to the point of beginning.

Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west along the northerly line of Clay street four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence northwardly along the east line of Octavia street one hundred and thirty-seven and a half (137½) feet, to a point midway between Clay and Washington streets; thence eastwardly parallel with and midway between Clay and Washington streets four hundred and twelve and a half (412½) feet to the west line of Gough street; thence south-
462 wardly along the last-named line one hundred and thirty-seven and a half (137½) feet to the place of beginning.

And finally because of the tenancy in common in the said land existing between said plaintiff and said defendant, it is hereby ordered, adjudged and decreed that the complaint be dismissed with costs.

E. D. SAWYER,
District Judge.

(Endorsed:) Filed this 5th day of September, 1867. Wm. Loewy, cl'k, p'r Jas. E. Ashcom, D. C.

(Title of Court and Cause.)

HOLLADAY
vs.
SAN FRANCISCO.

Final Decree to Quiet Title.

The motion of plaintiff herein to modify the judgment heretofore entered herein so as to conform the same to the decision of findings of fact and of law signed by the judge of this court, and filed herein coming on regularly to be heard on the 17th day of September, 1867, the plaintiff being heard in support of his said motion, and H. M. Hastings, Esq., the city and county attorney, being
463 heard in opposition to said motion, and the court having duly considered the premises, it is now and therefore hereby ordered, that the order and decree heretofore entered in this cause, dismissing the complaint herein, be and the same is hereby vacated

and in place of said order and judgment, dismissing plaintiff's complaint with costs, the following judgment be and the same is hereby rendered to wit:

From the facts and conclusions of law found, decided and signed by the judge of this court, and on file with the record in this cause, it is now hereby

Ordered, adjudged and decreed that the said plaintiff Samuel W. Holladay is the owner in fee-simple absolute of an undivided interest of nineteen-twentieths ($\frac{19}{20}$) and no more, in and of the land described in the complaint and the whole thereof as a tenant in common, with the defendant the municipal corporation in the city and county of San Francisco, which is the owner of an undivided one-twentieth ($\frac{1}{20}$) and no more, in and of the same land as a tenant in common with the plaintiff, and the said parties (plaintiff and defendant) are entitled to the possession of said land in accordance with their respective interests therein as above stated, that is
464 to say, $\frac{19}{20}$ thereof in the plaintiff and $\frac{1}{20}$ thereof in the defendant as tenants in common in that proportion—each with the other, and that as to his undivided $\frac{19}{20}$ thereof the title of said plaintiff be quieted as against the said defendant who is hereby adjudged to have no right, title or interest therein, and that as to the other or remaining $\frac{1}{20}$ thereof belonging to the defendant, the title thereto be quieted as against the said plaintiff who is hereby adjudged to have no right, title or interest therein.

The land and premises described in the complaint in this action and hereby referred to are situated in this city and county of San Francisco, State of California, and the same are bounded and described as follows:

First. Commencing where the southerly line of Clay street intersects the westerly line of Gough street, thence running westwardly along the southerly line of Clay street 412½ feet and to the easterly line of Octavia street; thence southwardly along the last-named line 137½ feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly parallel with and midway between Clay and Sacramento streets 412½ feet to the west line of Gough street; thence northwardly along the
465 last-named line 137½ feet, more or less, to the point of beginning.

Secondly. Commencing where the northerly line of Clay street intersects the westerly line of Gough street, thence west along the northerly line of Clay street 412½ feet to the easterly line of Octavia street; thence northwardly along the last-named line 137½ feet to a point midway between Clay and Washington streets; thence eastwardly parallel and midway between Clay and Washington street-412½ feet to the west line of Gough street; thence southwardly along the last-named line 137½ feet to the place of beginning.

And it is further ordered and adjudged that each party pay his own costs herein without reserve as against the other.

Dated this 25th day of September, A. D. 1867.

E. D. SAWYER,
District Judge.

Decree recorded October 3d, A. D. 1867.

(Endorsed:) Filed Sept. 26, 1867. Wm. Loewy, cl'k, by Jno. F. Boden, dep. cl'k.

466 District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

SAMUEL W. HOLLADAY
vs.
CITY AND COUNTY OF SAN FRANCISCO.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, Wm. Loewy, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the district court of the fourth judicial district thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in Judgment Book G, of said court, at page 630. And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said case.

Witness my hand and the seal of said district court, this 3rd day of October, A. D. 1867.

[SEAL.]

WM. LOEWY, *Clerk*,
By L. J. LEE,
Deputy Clerk.

(Endorsed:) Filed October 3rd, A. D. 1867.

To this record the plaintiff at the time objected as follows:

467 This record is not binding upon the city of San Francisco, or the people of the State of California, for the reason that at the date of the institution of this suit, all the title that the city of San Francisco had, was the bare right to the possession of this land in trust for the people of the State. There was no tribunal in California that could take cognizance of any action against the people of the State, except by leave of the legislature, which is not shown. Further, no authority from the board of supervisors to the city attorney to defend this action is shown, which under the two acts of the legislature, under the act of the legislature, approved March 25, 1862, defining the duties of the city and county attorney of the city of San Francisco, or as he is called in the act, the attorney and counsellor for the city and county of San Francisco, was requisite. No service could be made upon the mayor of San Francisco, so as to bind the *cestuis que trust*. No power existed in this court, or in any court in the State to pass on the right in a suit in which any citizen was actor against the people of the State. The judgment therefore, is *coram non judice*.

These objections were overruled by the court; the record admitted in evidence; to which the plaintiff at the time excepted.

The defendants then proved (after objection by the plain-
468 tiff that the testimony was irrelevant; which objection was overruled by the court, and exception in proper form taken), that the defendant S. W. Holladay, had, before the present suit was begun, made a tender to the mayor for the use and benefit of the city and county of San Francisco as grantee therein of a good and efficient deed of one-twentieth of the lands described in the amended complaint in this action, and that said mayor had refused such tender.

The defendants next offered in evidence the judgment-roll in case No. 10459, of the fifteenth district court of California, which is as follows:

In the District Court of the Fifteenth Judicial District of the State of California in and for the City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA, by Jo. HAMILTON, Attorney General, at the Relation of Andrew J. Bryant, Plaintiff,

vs.

SAMUEL W. HOLLADAY, GEORGIA C. O. HOLLADAY, S. L. MASTICK, R. G. DAVISSON, Defendants.

Complaint.

469 The People of the State of California, by Jo. Hamilton, attorney general of said State, at the relation of Andrew J. Byrant, allege:

That said Andrew J. Bryant is a citizen of the United States of America, and a citizen, resident and tax-payer and a householder and freeholder of the city and county of San Francisco, in said State of California.

That a certain piece or parcel of land, situate in said city and county, in what is known as the Western addition thereof, and bounded by Gough street on the east, Washington street on the north, Laguna street on the west, and Sacramento street on the south, was heretofore, to wit: on the eleventh day of March, A. D. 1858, by the lawful owner and proprietor thereof, lawfully dedicated to public use as a public square by the name of "Lafayette park," and such dedication accepted by the public, and then was, and still is, laid down upon the official map of said city and county, as a public square, as aforesaid.

That said public square is valuable for the purposes of such public square, and with other public squares and plazas in said city and county, dedicated at the same time, was intended to and would and does add to the comfort, convenience and health of the citizens and residents of said city and county, and of the people of said State, visiting or passing through said city and county.

470 That the defendants have erected and constructed fences within and upon said premises and public square, which fences enclose, and are the means of excluding all persons other

than said defendants, their agents and employees from all of that certain piece or parcel of said public square which is bounded and described as follows: Commencing at a point on the westerly line of Gough street, distant 127 feet 8¼ inches northerly from the N. W. corner of Sacramento and Gough streets; thence running in a northerly direction along said westerly line of Gough street 324 feet 1½ inches; thence at right angles westerly 412 6/12 feet; thence at right angles southerly 324 feet 1½ inches; thence at right angles easterly 411 6/12 feet to the place of commencement. Which fences still continue and are maintained there by said defendants, and the said defendants have erected and maintained and still maintain a dwelling-house, and outbuildings and other permanent improvements, within and upon the premises last above described, and have threatened to erect, construct and continue, and now threaten, and it is their purpose to erect, construct and continue upon the premises last aforesaid, other permanent improvements, and to continue and maintain upon said "Lafayette park" the said fences, dwelling-house, and outbuildings and other permanent improvements first aforesaid.

471 That the continuance of said fences, dwelling-house, outbuildings and other permanent improvements erected and constructed, as aforesaid, upon said public square, will greatly and irremediably interfere with and hinder the use by the public of said public square first aforesaid, and the public will be irremediably prejudiced and injured thereby.

That if the said purpose and threatening of the defendants be pursued and carried out, it will greatly and irremediably interfere with, and hinder the use and enjoyment by the public, and the citizens of said city and county, of said public square called "Lafayette park."

That the said fences, dwelling-house, outhouses and other permanent improvements now maintained as aforesaid, are and will continue to be, until removed therefrom, and such other permanent improvements which defendants threaten and have a purpose as aforesaid to erect, construct and maintain, will, if so erected, constructed and maintained, be obstructions and common public nuisances in and upon said Lafayette park.

That ever since the 1st day of July, A. D. 1856, the city and county of San Francisco has been and is a municipal corporation, pursuant to the laws of the State of California.

472 That said relator and the people of the State of California are, by reason of said obstructions and nuisances, prevented from the free use of said Lafayette park, and from any use of that part of said Lafayette park secondly hereinbefore described, and so will be prevented unless and until such obstructions shall be removed, and such nuisances abated.

That the defendants will continue such obstructions and nuisances, unless enjoined and restrained from so doing, and compelled to remove such obstructions and abate such nuisances by the decree of this honorable court.

Wherefore the people of said State, by their attorney general aforesaid, pray:

First. That said fences, dwelling-house, outbuildings and other improvements upon said premises be, by the judgment and decree of this honorable court, determined to be nuisances.

Second. That the defendants be decreed to remove said fences, dwelling-house, outbuildings, and other improvements from said Lafayette park, and to abate such nuisances.

Third. That by the decree of this honorable court said defendants, their agents, attorneys, employees, servants and assigns,
473 be forever restrained from placing, erecting, constructing, maintaining or continuing such or any fences, dwelling-house, outbuildings or other improvements, or any of them, or any obstructions or nuisances in, upon or across said "Lafayette park;" and in the meantime, and until the final determination of this cause, and the final decree of this court herein, said defendants, their agents, attorneys, employees, servants, and assigns, be enjoined and restrained from maintaining or continuing said or any fences, dwelling-house, outbuildings, improvements, or any obstructions or nuisances in, upon or across said Lafayette park.

Fourth. That by the final decree herein it be decreed that the defendants, employees, servants, and assigns leave said Lafayette park free and unobstructed for the use of the people of the State of California as a public square.

Fifth. For such other and further relief, or either, as may be just, and for costs of suit.

JO. HAMILTON,
Attorney General of the State of California.

W. C. BURNETT,
Of Counsel for Pl't'ff, upon Whom Papers may be Served at His Office in San Francisco, California.

474 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Andrew J. Bryant, being duly sworn, deposes and says: That he is the relator mentioned in the foregoing complaint; that he has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes the same to be true.

A. J. BRYANT.

Subscribed and sworn to before me, this eleventh day of February, A. D. 1878.

H. W. KIND,
Deputy Co. Clerk.

(Endorsed:) Filed March 5th, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, deputy clerk.

Permit to Sue in the Name of the People.

ATTORNEY GENERAL'S OFFICE, *Feb.* 13*th*, 1878.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT
vs.
HOLLADAY.

Upon reading the petition filed in the above-entitled mat-
475 ter, and being satisfied therefrom that this is a proper case for the use of the name of the people of the State of California and their attorney general for the enforcement of the right and the correction of the wrong in the said matter set out, leave is hereby given Andrew J. Bryant, the petitioner, and W. C. Burnett, his attorney, to use the name of the people of the State of California and to sue in such name in such court as may have jurisdiction of the subject-matter, and of the parties, and to sign the name of the attorney general to all pleadings and papers in any manner connected therewith, to the proper enforcement of the rights and correction of the wrongs in said petition set out. Upon the express terms and conditions, however, that the State of California shall in no event be held responsible for any cost, charges, or attorney's fees in or about the said suit or suits in any manner connected therewith. And to this end the said Andrew J. Bryant, relator, shall, at the time of filing the complaint herein, file a good and sufficient bond with the said complaint, to that effect, with sufficient sureties, in the sum of — dollars. And provided further, that the attorney general may at all times, at any and every stage of the said suit, withdraw therefrom, and discontinue or dismiss the same, as to him may seem fit and proper.

476 Given at the office of the attorney general of California, this thirteenth day of February, 1878.

JO. HAMILTON,
Attorney General.

(Endorsed:) Filed 5th day of March, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, deputy clerk.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT
v.
HOLLADAY.

Summons.

Action brought in the district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco in the office of the clerk of said district court.

The People of the State of California send greeting to Samuel W. Holladay, Georgia C. O. Holladay, S. L. Mastick, R. G. Davisson, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the fifteenth judicial district of the State of California, in and for
477 the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a judgment and decree of this court, adjudging and decreeing the fences, dwelling-house, outbuildings and other improvements upon that certain piece or parcel of land lying in the city and county aforesaid, and what is known as the Western addition thereof, and lawfully dedicated to public use as a public square by name of "Lafayette park," and in the complaint filed herein particularly described, special reference to which is hereby made, to be a public nuisance, and that said defendants be decreed to remove the said fences, dwelling-house, and outbuildings, and other improvements, and to abate said nuisances; and that it may be further adjudged and decreed that the said defendants, their attorneys, servants and assigns be forever restrained from constructing or maintaining said fences and improvements, or any of them, the said nuisances, upon or across said "Lafayette park," and in the meantime and until final determination of
478 this action and the final decree of this court herein, said defendants, their attorneys and servants, and assigns be enjoined and restrained from maintaining said improvements, obstructions or nuisances in, upon or across said "Lafayette park," and by the final decree herein it may be adjudged and determined that the defendants, their servants and assigns leave said "park" free and unobstructed for the use and benefit of the public of the State of California, and for general relief and for costs of this action.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and the seal of the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, this 5th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[Seal of Court.]

THOS. H. REYNOLDS, *Clerk*,
By M. J. McGRATH, *Deputy Clerk*.

(Endorsed:) Filed March 11th, 1878.

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on
479 the 7th day of March, A. D. 1878, and personally served the same on the 9th day of March, A. D. 1878, upon Samuel W. Holladay and Georgia C. O. Holladay, and R. G. Davisson, and on the 11th day of March, 1878, upon S. L. Mastick, the therein-named defendants, by delivering to Samuel W. Holladay, Georgia C. O. Holladay, S. L. Mastick and R. G. Davisson, and to each of them, said defendants, personally, in the city and county of San Francisco, a copy of said summons; the copy so served upon Samuel W. Holladay being attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 17th day of March, 1878.

MATHEW NUNAN, *Sheriff*,
By GEORGE S. WRIGHT,
Deputy Sheriff.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT
vs.
HOLLADAY.

Answer.

Now comes S. W. Holladay, Georgiana C. Ord Holladay, S. L. Mastick and R. G. Davisson, the defendants in the above-entitled cause, and for their answer to the complaint herein they admit, allege and deny as follows:

480 1st. They deny that the land firstly described in the complaint was on the 11th of March, 1858, or ever at any time dedicated to public use, either as a public square or for any public use whatever. They deny that it was ever dedicated to public uses by the name of Lafayette park or otherwise, or that the alleged dedication, or any dedication thereof, or of any part thereof, was ever accepted by the public; but, on the contrary, these defendants allege that said land described in the complaint as Lafayette park is and has been continuously since the year 1850, held and possessed, occupied and claimed as private property by these defendants and

others, under and through some of whom these defendants claim title to the parts thereof hereinafter particularly described.

2nd. Defendants allege that such possession and occupation last stated is and has been for all the time stated adverse to and inconsistent with all and every right, title and claim of the people of the State, or of the public, and that the same has been so possessed, occupied and held in adverse and private ownership.

3rd. Defendants admit that said land appears and is laid down on the official map of the city and county of San Francisco as Lafayette park; but they aver that it was so placed and laid
481 down thereon, without right and without the consent or authority of the owners of the land, and without any competent authority.

4th. Defendants deny that said so-called public square is valuable for the purposes of such or a public square; but, on the contrary, they aver that it is of no value for the purposes of such or a public square, and allege that said land is valuable only for the private purposes for which it is now used to the exclusion of all public uses thereof whatsoever; and they deny that it was at the same time with other public squares and plazas in said city and county, or with any public square or plaza therein or at any time or in any way whatever dedicated to public use or was intended to or would or does add to the comfort, convenience or health of the citizens or residents of said city and county, or of the people of said State visiting or passing through said city and county as a public park, square or plaza, or otherwise than as the private property of these defendants and others, the private owners and occupants thereof.

5th. Defendants admit that they have severally, each upon the lots or parcels by him or her separately and severally claimed, erected and constructed fences within and upon portions of the premises in said complaint named as a public square and
482 within and upon all that portion thereof described as follows, to wit: Commencing at a point on the westerly line of Gough street, distant in a northerly direction one hundred and twenty-seven feet eight one-quarter inches from the northwest corner of Sacramento and Gough streets, and running thence northerly along the westerly line of Gough street one hundred and twenty-seven feet and eight inches to the southwesterly corner of Gough and Clay streets if extended through said block of land; thence at right angles westerly four hundred and twelve and one-half feet to the east line of Octavia street, extended through said block of land; thence at right angles southerly along the said east line of Octavia street so projected one hundred and twenty-seven feet and eight and one-fourth inches; thence at right angles eastwardly four hundred and twelve and one-half feet to the point of beginning; and upon and within all that other portion thereof described as follows, to wit: Commencing at a point on the westerly line of Gough street three hundred and twenty-four feet and one and one-half inches northerly from the northwest corner of Gough and Sacramento streets and running thence northerly along the westerly line of Gough street one hundred and twenty-seven feet and eight and one-fourth

inches; thence at right angles westerly four hundred and twelve and one-half feet to the east line of Octavia street, 483 if projected and extended through said block of land; thence at right angles southerly along the said east line of Octavia street so projected one hundred and twenty-seven feet and eight and one-fourth inches to the northerly line of Clay street, if projected through the said blocks of land; thence at right angles easterly four hundred and twelve and one-half feet to the point of beginning, and admit that they severally still continue to maintain such fences and a dwelling-house and outbuildings and other permanent improvements thereon, and that it is the purpose of the defendants severally each upon his own lands to maintain the said improvements and to erect, construct and maintain other permanent improvements on said lands and that the continuance of the said fences, houses and other improvements on said lands now does and will exclude the public therefrom, and now does and in the future will interfere with and hinder and prevent the use thereof by the public as a public square or otherwise, but defendants deny that the plaintiffs or the public or any person whatever will be greatly or in any way injured or prejudiced thereby, or that the said fences, house, outhouses and permanent improvements are or will be obstructions or nuisances in any way whatever; and deny that the defendants or any or either of them have occupied or possessed, or claimed 484 the right to occupy, hold or improve, or erected or built fences or house or improvement of any kind upon or within any portion of the lands in the complaint described, except the portions thereof hereinbefore particularly described.

6th. And for other further and special answer these defendants allege that the plaintiffs ought not to have or maintain this action for this, to wit:

That this same matter has been heretofore and before the commencement of this suit fully and finally adjudged and decided against the plaintiffs and in favor of defendants herein.

That all and singular the matters in issue in this action are *res judicata*. In support thereof defendants allege that heretofore on the 16th of November, 1863. The People of the State of California, at the relation of one George T. Bohen by their attorney general commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (who is one of the defendants herein), John Doe and Richard Roe and A. P. Anderson as defendants. That in and by said complaint it was alleged that the same land firstly described in the complaint in this ac- 485 tion had been theretofore by the lawful owner and proprietor thereof dedicated to and accepted by the public as a public plaza or square, and that it had always since been taken, recognized and marked and laid down upon the official map and plan of said city and county as a public square or plaza, and called Lafayette square, and that it was intended to add to the comfort, convenience and health of the citizens resident in or visiting said city and county of San Francisco, and that the said defendants in said com-

plaint named were erecting fences and other permanent improvements upon said public square or plaza, and that the said erections, fences and improvements irremediably interfere with and hinder the use and enjoyment of the same by the public and the citizens of the said city and county.

That in and by the said complaint The People of the State of California the plaintiffs therein prayed that the said defendants therein be enjoined from erecting or constructing further fences, works or improvements upon said alleged square, and that the said defendants therein be decreed to abate and remove therefrom all improvements, fences or obstructions placed thereon by them and for general relief and upon the said complaint and on motion of the plaintiffs therefor, the court granted and issued a temporary injunction.

486 And these defendants further aver that summons was duly issued on said complaint and the same was duly served on the defendants therein, namely, S. W. Holladay, H. P. Herrick under the name of John Doe and A. P. Anderson, and afterward, to wit: November 27th, 1863, they, the said defendants therein last named, appeared in said action and filed their answer therein, wherein they, the said defendants Holladay, Herrick and Anderson, denied that the land in said complaint mentioned was by the owner or proprietor thereof ever dedicated to or accepted by the public as a public square or plaza, but on the contrary they allege that the public had no right to the use of that portion of said land claimed by said defendants therein which was therein particularly described and was and is the same land particularly described in this answer and claimed by these defendants.

Said defendants in said action defended for and in and by their answer therein claimed and alleged title in the defendant Holladay to the same land which is now claimed by the defendants herein and which is hereinbefore, in subdivision 5th of this answer, particularly described.

Defendants further allege that afterwards to wit: on April 21st, 1864, said cause came on regularly for trial in its order on
487 the calendar, when the respective parties appeared by their attorneys and submitted to the court their proofs, and evidence oral and documentary, the testimony was regularly closed and the cause was submitted to the court for its consideration and decision.

That afterwards, to wit: on July 11th, 1864, the court rendered its decision in said cause upon all the issues therein against the plaintiffs and in favor of the defendants therein and dissolved the injunction theretofore issued therein; and thereupon in pursuance of said decision the decree of said court was duly entered, wherein and whereby it was by the consideration of said court ordered, adjudged and decreed that the said plaintiffs therein take nothing by their said action, but that the defendant, Samuel W. Holladay, was at the time of the commencement of said action and then still was in the true and lawful possession as the owner thereof, of so much of the land in said complaint described as was claimed in his answer,

namely: "The six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets," and otherwise bounded and described as follows:

First. On the north by Clay street, on the east by Gough street, on the south by a line midway between Clay and Sacramento
488 streets, and on the west by Octavia street. Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street; on the south by Clay street and on the west by Octavia street, and as to said parcels of land last described it was adjudged and decreed that the defendant, Samuel W. Holladay, was from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof as against the plaintiffs, and so continued owner to the time of the commencement and trial of said action with his fences and improvements thereon and that the said land never was nor had been by the lawful owner or proprietor thereof, lawfully nor in any manner dedicated to, or accepted or used by the public as a public square or plaza, or for any public use, but that the same was during all that time and is the private property and in the actual and lawful possession of said S. W. Holladay, free and clear from any dedication to any public uses whatever. It was also therein further adjudged that the defendant Hazard P. Herrick (who in said complaint was impleaded by the fictitious name of John Doe) and the defendant A. P. Anderson had no right in or claim to said land, but that they were the mere servants and employees of said defendant Holladay.

It was therein further adjudged that the said S. W. Holla-
489 day had not at the time of the commencement of said action any right, possession or claim to any part of said land in said complaint in said action described, except the six fifty-vara lots described in his said answer and which are also last above described.

Defendants further allege that immediately after the rendition of said decision by said court the said defendants gave plaintiffs due notice thereof in writing.

That said decision and decree have never been appealed from, vacated and reversed in any manner, but the same have ever since remained and now remain of record in full force and effect as a final adjudication and determination of all the issues in said action in favor of the said defendant, S. W. Holladay, the then owner, possessor and claimant of said premises and in favor of the defendants in this action who claim title under and through said S. W. Holladay by conveyances subsequent to the date of such adjudication and determination.

7th. Defendants further allege that the land described in the complaint and answer in said action in the 4th district court of which the said Holladay was in possession and which was adjudged to him as against said plaintiffs, was and is the same identical
490 land, namely: six fifty-vara lots mentioned, described and included in the description in the complaint in this action, and the plaintiffs in that action in the 4th district court above men-

tioned are the same as the plaintiffs in this action, and the facts and matters in issue which were tried and finally determined in that action in favor of the defendant S. W. Holladay, are the same identical facts and matters which are in issue in this action, and the said S. W. Holladay, defendant in that action, is the same S. W. Holladay who is one of the defendants in this action, and is the grantor of the other defendants herein as to all the land so adjudged to him in said action as above stated and all the lands claimed by defendants herein by deed subsequent to the rendition of said decision.

And these defendants aver that the said judgment and decree of the said district court is a final and conclusive adjudication and determination of all the issues in the said action and in this action involved, and of all the right, title and interest of The People of the State of California who were plaintiffs in that action and are plaintiffs in this action in and to the said land in the answer and decree therein and in this answer particularly described, whether
491 claiming the same as and for a public square, park or plaza or for any any other use or purpose, public or private, and that the plaintiffs herein are by the said judgment and decree estopped and barred from again in this action, or in any action asserting or claiming any right, title or interest in, or control over the said land as a public square, park or plaza, or otherwise for the use and convenience of the public or for any use whatever.

8th. And for other and further defense to this action, defendants aver that ever since April 19th, 1856, the city and county of San Francisco has been and still is a municipal corporation by that name organized and acting under and by virtue of the laws of this State, under and by virtue of which laws said city and county claims the jurisdiction over, and the possession of all public squares and plazas within her corporate limits; by virtue of such authority at and before the times hereinafter mentioned said city and county claimed jurisdiction over, and the right of possession of the land hereinafter described.

That on the 17th of December, 1864, this defendant, S. W. Holladay, was the owner and in the actual possession of the parcel of land particularly described in the complaint by metes and bounds and bounded and described as follows:

First. Bounded on the north by Clay street; on the east
492 by Gough street; on the south by a line midway between Clay and Sacramento streets; and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

That on or about the said 17th day of December, 1864, said Holladay, as plaintiff therein, commenced an action against the said corporation, The City and County of San Francisco, as defendant, in the fourth district court in and for said city and county, the purpose of which action was to quiet his, the said Holladay's title to said lands,

last described, as against all right and claims or title of said city and county.

That said city and county appeared by her attorneys and answered the complaint in said action.

That afterwards, on or about the 25th day of September, 1865, said cause came on regularly in its order for trial, and the respective parties thereto appeared by their respective attorneys, and proofs, oral and documentary, were presented and submitted to the court for consideration and decision, and such proceedings were had thereon, that afterwards, on the 3rd day of October, 1867,

493 the said 4th district court rendered its final judgment and decree in said action, whereby it was adjudged and decreed that said S. W. Holladay, plaintiff therein, was the owner in fee-simple absolute of an undivided interest equal to nineteen*th*-twentieths ($\frac{19}{20}$) of all and singular the parcels of land last above described, and that the said City and County of San Francisco, defendant therein, was the owner of an undivided interest equal to one-twentieth ($\frac{1}{20}$) of the same land last above described, and that said Holladay and said city and county were tenants in common with each other in said land in the proportions last stated, and quieting the title of said Holladay as to his said nineteen-twentieths ($\frac{19}{20}$) of said land, as against said city and county.

That said judgment was never in any manner reversed or vacated, but the same has ever since stood and remained and still is a final judgment and decree of record in said 4th district court in full force and virtue.

9th. That after the rendition of the two judgments above mentioned said S. W. Holladay, for a full and adequate consideration, sold and conveyed to Henry H. Haight one parcel of said premises, namely, the lot at the northwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay

494 street by one hundred and twenty-seven feet and eight and one-fourth inches on Gough street, by deed dated October 19th, 1868, and recorded October 20th, 1868, in Liber 466 of Deeds, page 127, of the county recorder's office of said city and county of San Francisco.

That afterwards, to wit, February 16th, 1869, the said Henry H. Haight, for full value, to wit: for the sum of $7,050.00, sold and conveyed the lot last named to R. G. Davisson, one of the defendants herein, by deed of conveyance, duly recorded February 18th, 1869, in Liber 480 of Deeds, page 361, in the county recorder's office of said city and county, and the defendant, R. G. Davisson, entered under said deed, relying on the same as a title secured and settled by the judgment aforesaid, and sunk a well upon the land, and made other valuable improvements thereon, and he still occupies and holds the said lot in his possession.

10th. That on the 16th day of July, 1868, the said S. W. Holladay sold and conveyed to S. L. Mastick, his codefendant herein, one other parcel of said premises, namely, the lot at the southwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street by one hundred and twenty-seven

feet eight and one-fourth inches on Gough street, for the
495 price and consideration of $4,500.00 paid therefor, and the deed for which was recorded August 5th, 1868, in Liber 450 of Deeds of the office of the county recorder of said city and county.

That under and by virtue of his said deed, said S. L. Mastick entered upon his lot so purchased, relying upon his said deed for the same as a title secured and settled by the judgments aforesaid, and thereupon he, with the full knowledge of the plaintiffs, graded and fenced the land, sunk a well thereon, and built an expensive stone wall in front, and erected a costly building and other improvements thereon, at a cost of about $7,000.00, and he has ever since held and still holds and occupies said premises, with the improvements thereon, openly and notoriously, with the full knowledge of and notice to the plaintiffs.

That the plaintiffs had full notice and knowledge, at the time he, the said Mastick, entered, and while he was erecting said improvements, and spending his money on said land, that he was claiming the same in good faith, under said deed and judgments and decrees, as the owner thereof, and yet the plaintiffs made no objections thereto.

11th. That afterwards, to wit, May 5th, 1869, this defendant, S. W. Holladay, conveyed, by deed of that date, to defendant, Georgiana C. Ord Holladay, the rest of said land, namely:

496 First. The parcel bounded on the north by Clay street, on the west by Octavia street; on the south by a line midway between Clay and Sacramento streets, and on the east by a line two hundred and seventy-five feet east of Octavia street; and

Second. The parcel bounded on the west by Octavia street, on the north by a line midway between Clay and Washington streets, on the east by a line two hundred and seventy-five feet east of Octavia street, and on the south by Clay street.

Which deed was recorded May 8th, 1869, in Liber 506 of Deeds, page 157, in the office of the county recorder of said city and county of San Francisco.

That the said S. W. Holladay and G. C. O. Holladay, early in the year 1869, erected costly buildings and valuable improvements upon said land, to their cost and of the value of $15,000.00.

12th. That plaintiffs had full notice and knowledge at the time while the defendants last named were spending their money and erecting their said improvements on said land, that they were claiming the same in good faith, under said judgments and decrees, as the owners thereof, and yet the plaintiffs made no objections thereto, and

by reason thereof the plaintiffs are now estopped from as-
497 serting any right, title or interest in or use of the said lands, or of any part thereof.

13th. Defendants further allege that the city and county of San Francisco, under and by authority of the State of California, caused Gough street, along the front of the premises in question, to be graded, macadamized and curbed, including the crossing of Clay and Gough streets, and the said corporation, through her officers, assessed the whole cost of said work upon the premises in question,

and warrants were regularly issued by the street superintendent for the collection of the assessments aforesaid, and these defendants were compelled to and did pay the same.

14th. Defendants further allege that after the rendition of the judgments and decrees above recited, namely, in the month of March, 1876, the board of supervisors of the city and county of San Francisco, by unanimous vote of its twelve members passed the order which was afterwards, on the 23rd day of March, 1876, approved by the mayor, entitled "Order No. 1269, providing for a partition and exchange of deeds between the city and county of San Francisco and the owners of certain lands."

That in and by said order 1269 it is recited as a fact that
498 the city and county of San Francisco and these defendants by name are claiming as tenants in common all the land mentioned and described in said order (which is the same identical land herein referred to), and that said city and county claims the undivided one-twentieth thereof as tenant in common with these defendants therein named as claiming the other nineteen-twentieths in different parcels, as between themselves as tenants in common with said city and county; and in said order it is further recited as a fact that in said action of The People *vs.* Holladay, *et al.*, in the 4th district court, above recited, it is adjudged that said land was never reserved or dedicated to any public use whatsoever, but that the same was the private property of said S. W. Holladay, the defendant therein, and that the said owners of said nineteen-twentieths have proposed a partition and segregation of their respective interests from those of said city and county, which proposition the said city and county is desirous of accepting in settlement and segregation of the rights, interests and privileges of the said parties, and that the said Mastick, Davisson and Holladay have agreed to convey a certain specified parcel thereof to said city and county, in exchange or equivalent for the claim and interest of said city and county in all the rest of said land; thereupon it was, in and by the terms of said order 1269, ordained that on the delivery of a good and sufficient
499 grant or conveyance by said Mastick, Davisson and Holladay, to said city and county, for the said parcel therein specified, namely, the lot at the southeast corner of Octavia and Clay streets, fronting one hundred and twenty-seven feet and eight and one-fourth inches on Octavia street by forty-four feet three inches on Clay street as, for and in lieu of the claim of said city and county, in and to the undivided one-twentieth of the whole of the rest of said land (thereby meaning and describing the three fifty-vara lots on the south side of Clay street, between Gough street and Octavia street, and also the three fifty-vara lots on north side of Clay street, between Gough and Octavia streets), and in partition of said land by and between the said city and county and the said parties, the mayor was by said order authorized and empowered to make, execute and deliver to these defendants, S. L. Mastick, R. G. Davisson and Georgiana C. Ord Holladay, deeds of grant and release for and in the name of said city and county of all its right,

title, claim and interest in and to all the rest and remainder of said parcels of land (*i. e.*, excepting the said parcel so partitioned to said city and county, above described), and to each of them in severalty, the parcel designated to each as specified in said order.

That said order No. 1269 still remains in full force and virtue.

500 That after the passage of said order 1269, these defendants executed and tendered to said city and county a good, perfect and sufficient deed of conveyance to said city and county for the land therein specified as partitioned to said corporation, and defendants have always since been and now are ready and willing to deliver said deed.

Wherefore, the premises considered, the defendants pray judgment that plaintiffs take nothing by their action, and that defendants may have and recover of and from the plaintiffs their costs in this behalf expended.

March 29, 1878.

S. W. HOLLADAY,
W. C. BELCHER,
H. H. HAIGHT,
Att'ys for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Samuel W. Holladay, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled cause; that the matters stated in the foregoing answer are within his personal knowledge; that he has read the foregoing answer, and knows the contents thereof; that same is true of his own knowledge,

501 except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

S. W. HOLLADAY.

Subscribed and sworn to before me, this 29th day of March, A. D. 1878.

WM. A. STUART,
Deputy Co. Clerk.

Rec'd a copy of the foregoing answer this 20th day of March, 1878, with notice that any papers in the case to be served on defendants may be served on S. W. Holladay, as attorney for defendants, for that purpose.

S. W. HOLLADAY,
Def'ts' Att'y.
JO. HAMILTON,
Att'y Gen'l,
By W. C. BURNETT,
Of Counsel for Pl'ff.

(Endorsed:) Filed M'ch 29th, 1878. Thos. H. Reynolds, clerk, by M. J. MacGrath, dep. clerk.

(Title of Court and Cause.)

JANUARY 23RD, 1880.

It is ordered that the above-entitled cause (pending in the
502 district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, on the 31st day of December, A. D. 1879), be and the same is hereby assigned to department No. 5 of this court.

WM. P. DAINGERFIELD,
Presiding Judge.

(Endorsed:) Filed January 23, 1880. William A. Stuart, clerk, by Ed. A. Abell, deputy clerk.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT
vs.
HOLLADAY.

Amended Answer.

Now comes S. W. Holladay, Georgiana C. Ord Holladay, S. L. Mastick and R. G. Davisson, the defendants in the above-entitled cause, and for their amended answer to the complaint herein filed by leave of court, they admit, allege and deny as follows:

1st. They deny that the land firstly described in the complaint was on the 11th of March, 1858, or ever at any time dedicated to public use, either as a public square or for any public use whatever. They deny that it was ever dedicated to public uses by the name of Lafayette park, or otherwise, or that the alleged dedication,
503 or any dedication thereof, or of any part thereof, was ever accepted by the public; but, on the contrary, these defendants allege that said land described in the complaint as Lafayette park is and has been continuously, since the year 1850, held and possessed, occupied and claimed as private property by these defendants and others, under and through some of whom these defendants claim title to the parts thereof, hereinafter particularly described.

2nd. Defendants allege that such possession and occupation last stated is and has been for all the time stated adverse to and inconsistent with all and every right, title and claim of the people of the State, or of the public, and that the same has been so possessed, occupied and held in adverse and private ownership.

3rd. Defendants admit that said land appears and is laid down on the official map of the city and county of San Francisco as Lafayette park; but they aver that it was so placed and laid down thereon, without right and without the consent or authority of the owners of the land, and without any competent authority.

4th. Defendants deny that said so-called public square is valuable for the purposes of such or a public square; but, on the contrary,

they aver that it is of no value for the purposes of such or
504 a public square, and allege that said land is valuable only for the private purposes for which it is now used to the exclusion of all public uses thereof whatsoever; and they deny that it was at the same time with other public squares and plazas in said city and county, or with any public square or plaza therein or at any time or in any way whatever dedicated to public use or was intended to or would or does add to the comfort, convenience or health of the citizens or residents of said city and county, or of the people of said State visiting or passing through said city and county as a public park, square or plaza, or otherwise than as the private property of these defendants and others, the private owners and occupants thereof.

5th. Defendants admit that they have severally, each upon the lots or parcels by him or her separately and severally claimed, erected and constructed fences within and upon portions of the premises in said complaint named as a public square and within and upon all that portion thereof described as follows, to wit: Commencing at a point on the westerly line of Gough street, distant in a northerly direction one hundred and twenty-seven feet eight and one-quarter inches from the northwest corner of Sacramento and Gough streets, and running thence northerly
505 along the westerly line of Gough street one hundred and twenty-seven feet and eight and one-fourth inches to the southwesterly corner of Gough and Clay streets if extended through said block of land; thence at right angles westerly four hundred and twelve and one-half feet to the east line of Octavia street, extended through said block of land; thence at right angles southerly along the said east line of Octavia street so projected one hundred and twenty-seven feet and eight and one-fourth inches; thence at right angles eastwardly four hundred and twelve and one-half feet to the point of beginning; and upon and within all that other portion thereof described as follows, to wit: Commencing at a point on the westerly line of Gough street three hundred and twenty-four feet and one and one-half inches northerly from the northwest corner of Gough and Sacramento streets and running thence northerly along the westerly line of Gough street one hundred and twenty-seven feet and eight and one-fourth inches; thence at right angles westerly four hundred and twelve and one-half feet to the east line of Octavia street, if projected and extended through said block of land; thence at right angles southerly along the said east line of Octavia street so projected one hundred and twenty-seven feet and eight and one-fourth inches to the northerly line of Clay
506 street, if projected through the said block of land; thence at right angles easterly four hundred and twelve and one-half feet to the point of beginning, and admit that they severally still continue to maintain such fences and a dwelling-house and outbuildings and other permanent improvements thereon, and that it is the purpose of the defendants severally each upon his own lands to maintain the said improvements and to erect, construct and maintain other permanent improvements on said lands, and that the

continuance of the said fences, houses and other improvements on said lands now does and will exclude the public therefrom, and now does and in the future will interfere with and hinder and prevent the use thereof by the public as a public square or otherwise, but defendants deny that the plaintiffs or the public or any person whatever will be greatly or in any way injured or prejudiced thereby, or that the said fences, house, outhouses and permanent improvements are or will be obstructions or nuisances in any way whatever; and deny that the defendants or any or either of them have occupied or possessed, or claimed the right to occupy, hold or improve, or erected or built fences or house or improvement of any kind upon or within any portion of the lands in the complaint described, except the portions thereof hereinbefore particularly described.

507 6th. And for other further and special answer these defendants allege that the plaintiffs ought not to have or maintain this action, for this, to wit:

That this same matter has been heretofore and before the commencement of this suit fully and finally adjudged and decided against the plaintiffs and in favor of defendants herein.

That all and singular the matters in issue in this action are *res judicatæ*. In support thereof defendants allege that heretofore on the 16th of November, 1863, The People of the State of California, at the relation of one George T. Bohen by their attorney general commenced an action in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, by filing a complaint therein against S. W. Holladay (who is one of the defendants herein), John Doe and Richard Roe and A. P. Anderson as defendants. That in and by said complaint it was alleged that the same land firstly described in the complaint in this action had been theretofore by the lawful owner and proprietor thereof dedicated to and accepted by the public as a public plaza or square, and that it had always since been taken, recognized and marked and laid down upon the official map and plan of said city and county as a public square or plaza, and called

508 Lafayette square, and that it was intended to add to the comfort, convenience and health of the citizens resident in or visiting said city and county of San Francisco, and that the said defendants in said complaint named were erecting fences and other permanent improvements upon said public square or plaza, and that the said erections, fences and improvements irremediably interfere with and hinder the use and enjoyment of the same by the public and the citizens of the said city and county.

That in and by the said complaint The People of the State of California the plaintiffs therein prayed that the said defendants therein be enjoined from erecting or constructing further fences, works or improvements upon said alleged square, and that the said defendants therein be decreed to abate and remove therefrom all improvements, fences or obstructions placed thereon by them and for general relief and upon the said complaint and on motion of the plaintiffs therefor, the court granted and issued a temporary injunction.

And these defendants further aver that summons was duly issued on said complaint and the same was duly served on the defendants therein namely, S. W. Holladay, H. P. Herrick under the
509 name of John Doe and A. P. Anderson, and afterwards, to wit: November 27th, 1863, they, the said defendants therein last named, appeared in said action and filed their answer therein, wherein they, the said defendants Holladay, Herrick and Anderson, denied that the land in said complaint mentioned was by the owner or proprietor thereof ever dedicated to or accepted by the public as a public square or plaza, but on the contrary they allege that the public had no right to the use of that portion of said land claimed by said defendants therein which was therein particularly described and was and is the same land particularly described in this answer and claimed by these defendants.

Said defendants in said action defended for and in and by their answer therein claimed and alleged title in the defendant Holladay to the same land which is now claimed by the defendants herein and which is hereinbefore, in subdivision 5th of this answer, particularly described.

Defendants further allege that afterwards, to wit: on April 21st, 1864, said cause came on regularly for trial in its order on the calendar, when the respective parties appeared by their attorneys and submitted to the court their proofs, and evidence oral and documentary, the testimony was regularly closed and the cause was submitted to the court for its consideration and decision.

510 That afterwards, to wit: on July 11th, 1864, the court rendered its decision in said cause upon all the issues therein against the plaintiffs and in favor of the defendants therein and dissolved the injunction theretofore issued therein; and thereupon in pursuance of said decision the decree of said court was duly entered, wherein and whereby it was by the consideration of said court ordered, adjudged and decreed that the said plaintiffs therein take nothing by their said action, but that the defendant Samuel W. Holladay was at the time of the commencement of said action and then still was in the true and lawful possession as the owner thereof, of so much of the land in said complaint described as was claimed in his answer, namely: "The six fifty-vara lots lying, three of them on each side of Clay street between Gough and Octavia streets," and otherwise bounded and described as follows:

First. On the north by Clay street, on the east by Gough street, on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street. Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street; on the south by Clay street and on the west by Octavia street, and as to said parcels of land last
511 described it was adjudged and decreed that the defendant, Samuel W. Holladay, was from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof as against the plaintiffs, and so continued owner to the time of the commencement and trial of said action with his fences and improvements thereon and that the said land never was nor had

been by the lawful owner or proprietor thereof, lawfully nor in any manner dedicated to, or accepted or used by the public as a public square or plaza, or for any public use, but that the same was during all that time and is the private property and in the actual and lawful possession of said S. W. Holladay, free and clear from any dedication to any public uses whatever. It was also therein further adjudged that the defendant Hazard P. Herrick (who in said complaint was impleaded by the fictitious name of John Doe) and the defendant A. P. Anderson had no right in or claim to said land, but that they were the mere servants and employees of said defendant Holladay.

It was therein further adjudged that the said S. W. Holladay had not at the time of the commencement of said action any right, possession or claim to any part of said land in said complaint
512 in said action described, except the six fifty-vara lots described in his said answer and which are also last above described.

That said decision and decree have never been appealed from, vacated and reversed in any manner, but the same have ever since remained and now remain of record in full force and effect as a final adjudication and determination of all the issues in said action in favor of the said defendant, S. W. Holladay, the then owner, possessor and claimant of said premises and in favor of the defendants in this action who claim title under and through said S. W. Holladay by conveyances subsequent to the date of such adjudication and determination.

7th. Defendants further allege that the land described in the complaint and answer in said action in the 4th district court of which the said Holladay was in possession and which was adjudged to him as against said plaintiffs, was and is the same identical land, namely: six fifty-vara lots mentioned, described and included in the description in the complaint in this action, and the plaintiffs in that action in the 4th district court above mentioned are the same as the plaintiffs in this action, and the facts and matters in issue which
513 were tried and finally determined in that action in favor of the defendant, S. W. Holladay, are the same identical facts and matters which are in issue in this action, and the said S. W. Holladay, defendant in that action is the same S. W. Holladay who is one of the defendants in this action and is the grantor of the other defendants herein as to all the land so adjudged to him in said action as above stated and all the lands claimed by defendants herein by deed subsequent to the rendition of said decision.

And these defendants aver that the said judgment and decree of the said district court is a final and conclusive adjudication and determination of all the issues in the said action and in this action involved, and of all the right, title and interest of the people of the State of California who were plaintiffs in that action and are plaintiffs in this action in and to the said land in the answer and decree therein and in this answer particularly described, whether claiming the same as and for a public square, park or plaza or for any other use or purpose, public or private, and that the plaintiffs herein are

by the said judgment and decree estopped and barred from again in this action, or in any action asserting or claiming any right, title or interest in, or control over the said land as a public
514 square, park or plaza, or otherwise for the use and convenience of the public or for any use whatever.

8th. That after the rendition of the judgment above mentioned, said S. W. Holladay, for a full and adequate consideration, sold and conveyed to Henry H. Haight one parcel of said premises, namely, the lot at the northwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street by one hundred and twenty-seven feet and eight and one-fourth inches on Gough street, by deed dated October 19th, 1868, and recorded October 20th, 1868, in Liber 466 of Deeds, page 127, of the county recorder's office of said city and county of San Francisco.

That afterwards, to wit: February 16th, 1869, the said Henry H. Haight, for full value, to wit: for the sum of $7,050.00, sold and conveyed the lot last named to R. G. Davisson, one of the defendants herein, by deed of conveyance duly recorded February 18th, 1869, in Liber 480 of Deeds, page 361, in the county recorder's office of said city and county, and the defendant, R. G. Davisson, entered under said deed, relying on the same as a title secured and settled by the judgment aforesaid, and he still so occupies, claims and holds the said lot in his possession.

515 9th. That after said adjudication, to wit: on the 16th day of July, 1868, the said S. W. Holladay sold and conveyed to S. L. Mastick, his codefendant herein, one other parcel of said premises, namely, the lot at the southwest corner of Clay and Gough streets, fronting one hundred and thirty-seven and one-half feet on Clay street, by one hundred and twenty-seven feet eight and one-fourth inches on Gough street, for the price and consideration of $4,500.00 paid therefor, and the deed for which was recorded August 5th, 1868, in Liber 450 of Deeds of the office of the county recorder of said city and county.

That under and by virtue of his said deed, said S. L. Mastick entered upon his lot so purchased, relying upon his said deed for the same as a title secured and settled by the judgment aforesaid.

10th. That afterwards, to wit: May 5th, 1869, this defendant, S. W. Holladay, conveyed by deed of that date, to defendant, Georgiana C. Ord Holladay, the rest of said land, namely:

First. The parcel bounded on the north by Clay street, on the west by Octavia street, on the south by a line midway between Clay and Sacramento streets, and on the east by a line two hundred and seventy-five feet east of Octavia street; and

516 Second. The parcel bounded on the west by Octavia street, on the north by a line midway between Clay and Washington streets, on the east by a line two hundred and seventy-five feet east of Octavia street, and on the south by Clay street.

Which deed was recorded May 8th, 1869, in Liber 506 of Deeds, page 157, in the office of the county recorder of said city and county of San Francisco.

Wherefore, the premises considered, the defendants pray judg-

ment that plaintiffs take nothing by their action, and that defendants may have and recover of and from the plaintiffs their costs in this behalf expended.

S. W. HOLLADAY, *Att'y for Defendants.*
MASTICK, BELCHER & MASTICK,
Attorneys for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Samuel W. Holladay, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action, that the matters stated in the foregoing amended answer are within his personal knowledge; that he has read the foregoing amended
517 answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

S. W. HOLLADAY.

Subscribed and sworn to before me this 14th day of October, A. D. 1881.

WM. S. CAMPBELL,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Oct. 19th, 1881. David Wilder, clerk, by H. K. Moore, deputy clerk.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT }
vs. }
HOLLADAY. }

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial before the court, this 19th day of October, 1881, when the respective parties appeared by their attorneys (a jury having been duly waived), and plaintiffs and defendants introduced their evidence and proofs, and the counsel on each side argued and submitted the case for the consideration and decision of the court; and the court having duly considered
518 the same, now finds and decides as follows:

In this case the court finds the following facts:

I.

That the same cause of action stated in the complaint herein was fully litigated by and between these plaintiffs and S. W. Holladay, H. P. Herrick and A. P. Anderson as defendants, and finally adjudged and determined against the plaintiffs and in favor of said defendants, in and by the 4th district court, in and for this city and county, prior to the commencement of this action, in an action

therein numbered 11029 on the register of actions in said court; the said S. W. Holladay is the predecessor in interest of his codefendants herein. That the final decree in said action No. 11029 in the 4th district court reads as follows:

It is now, therefore, by the consideration of the court, ordered, adjudged and decreed, that the plaintiffs take nothing by this action, but that the defendant, Samuel W. Holladay, was at the time of the commencement of the suit, and is, in the true and lawful possession as the owner thereof, of so much of the land and premises described in the complaint as is claimed and described in his answer
519 as "the six fifty-vara lots lying, three of them on each side of Clay street, between Gough and Octavia streets," which lots are situated in the city and county of San Francisco, and are otherwise bounded and described as follows:

First. On the north by Clay street, on the east by Gough street, on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street, on the south by Clay street, and on the west by Octavia street.

That as to said parcels of land last above described as "first" and "second," it is adjudged and decreed that the defendant, Samuel W. Holladay, was, from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon, and that the said land never was nor has been, by the lawful owner or proprietor thereof, lawfully nor in any way dedicated to, accepted or used by the public as a public square or plaza, or for any public use, but that the same was all that time and is the
520 private property and in the actual and lawful possession of the defendant, Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant, Hazard P. Herrick (who in the complaint is called by the fictitious name of John Doe), and the defendant, A. P. Anderson, had not at the time of the commencement of this suit, or at any other time, any right or claim to any of the premises except as servants and workmen under and in the employ of defendant Holladay.

And it is further adjudged and decreed that the defendant, S. W. Holladay, has not, nor has he had at any time prior to the time of the commencement of this suit, any right or title in or to the possession of any part of the premises described in the complaint, consisting of four blocks bounded by Washington, Gough, Sacramento and Laguna streets, except the six fifty-vara lots mentioned in his answer, and embraced in the parcels "first" and "second," hereinabove described.

II.

That prior to the commencement of this action the same matters at issue and in question in this action, and all of them, were

521 actually litigated and finally adjudicated and determined against the plaintiffs and in favor of the defendants in an action No. 11029, commenced November 16, 1863, in the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, wherein the plaintiffs herein, The People of the State of California, were plaintiffs, and Samuel W. Holladay, H. P. Herrick and A. P. Anderson were defendants.

III.

That the parties plaintiff in that action in said 4th district court are the same as the parties plaintiff in this action, and the defendant, Samuel W. Holladay, in this action, was one of the defendants in that action, and the sole party defendant in interest therein. The other defendants therein, namely, H. P. Herrick and A. P. Anderson had no interest in the controversy, but were merely workmen in the employ of defendant Samuel W. Holladay.

IV.

That the land in question in that action was identically the same land which is in question in this action.

V.

522 That the defendants in this action, other than defendant Samuel W. Holladay, have derived from him by good and sufficient conveyances, in writing, since the trial of that action, all his right, title and interest in the land in question, and their interests respectively are correctly stated in paragraphs 8th, 9th and 10th of the amended answer herein; that all the allegations and facts and matters stated in said 8th, 9th and 10th paragraphs of the amended answer are true.

VI.

That no appeal was ever taken from the said judgment and decree, and the same now remain the final and conclusive judgment and decree of the court as to all the matters therein determined between the parties to said action and their privies in estate, and the said judgment and decree is a bar to this action, and the plaintiffs herein are by the said judgment and decree barred and estopped from maintaining this action against the defendants herein.

VII.

That the land now hereby referred to and adjudicated upon is correctly described in the amended answer herein, and is situated in the city and county of San Francisco, State of California, and is more particularly bounded and described in two parcels as follows:

523 First. Parcel bounded on the north by Clay street, on the east by Gough street, on the south by a line midway between

Clay and Sacramento streets, and on the west by Octavia street; and

Second. Parcel bounded on the north by a line midway between Clay and Washington streets, on the east by Gough street, on the south by Clay street, and on the west by Octavia street.

VIII.

That the defendants herein do not possess, occupy or claim, and have no right or title to any other part of the land described in the complaint herein, bounded by Washington, Gough, Sacramento and Laguna streets, except the parcels claimed in their amended answer herein, which parts are specifically described in paragraph or finding above numbered VII (seven), under the description therein following "First" and "Second" respectively.

And the following are the court's conclusions of law herein:

I.

That the plaintiffs are not entitled to recover in this action, but the defendants are entitled to a decision and judgment herein.

524

II.

That the former adjudication above described of this same cause of action between these plaintiffs and the said Samuel W. Holladay is a bar to this action; that the plaintiffs are thereby estopped from again litigating the matters therein determined.

III.

That a judgment should be entered herein in favor of the defendants accordingly, and the same is now hereby so ordered to be entered up of record.

Dated, signed and given in open court, this 4th day of November, 1881.

JOHN HUNT, JR., *Judge.*

(Endorsed:) Filed Nov. 7, 1881. David Wilder, clerk, by M. J. MacGrath, deputy clerk.

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BRYANT *vs.* HOLLADAY.

Judgment.

525 On the complaint and amended answer herein and upon the testimony introduced by the respective parties to the above-entitled action and upon and in accordance with the findings of fact and conclusions of law signed and filed herein; now by the consideration of the court it is hereby ordered, adjudged and decreed that The People of the State of California, the plaintiffs herein, take nothing by this action, but that the defendants herein,

Samuel W. Holladay, Georgiana C. Ord Holladay, Seabury L. Mastick and R. G. Davisson have judgment for their costs.

Dated, signed and given in open court at San Francisco, California, this 4th day of November, 1881.

JOHN HUNT, JR., *Judge.*

Judgment recorded November 7th, 1881; Book 1; page 494; dep't 5.

(Endorsed:) Filed November 7th, 1881. David Wilder, clerk, by M. J. MacGrath, deputy clerk.

(Title of Court and Cause.)

I, David Wilder, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the
526 judgment entered in the above-entitled cause, and recorded in Judgment Book 1, of said court at page 494, department No. 5. And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court, this 7th day of Nov., A. D. 1881.

DAVID WILDER, *Clerk,*
By GEO. T. EMERSON,
Deputy Clerk,

(Endorsed:) Filed Nov. 7th, 1881. David Wilder, clerk, by Geo. T. Emerson, deputy clerk.

With this offer the defendants also showed that the action was commenced pursuant to an order of the board of supervisors and that the action was attended to and the trial thereof conducted in court by the city and county attorney of San Francisco, and also by W. C. Burnett, as special counsel acting by request of the board of supervisors of San Francisco; to this record and testimony the plaintiff objected that it is irrelevant and immaterial and that the record speaks for itself.

The court overruled the objection and admitted the evidence and the plaintiff excepted.

It was admitted by plaintiff that the various deeds from de-
527 fendant S. W. Holladay, to the other defendants set out in the amended answer were made and delivered at the time therein averred.

The defendant- then proved that S. W. Holladay and the other defendants claiming by said deeds under him had been in the actual and exclusive possession of the lands claimed by them in their amended answer from the year 1851, to the present time, and that the other defendants had been in the actual and exclusive possession of those parcels of the land for which they set up deeds from said Holladay and wife ever since the respective dates of those deeds and previous to that time their said grantors had been in possession

thereof, from said year 1851, the defendants then proved that there was no other ordinance or proceedings of the common council of the city approving or adopting the said map, put in evidence by plaintiff from the custody of the surveyor, except the ordinance or order of the justices of the peace already in evidence and the other proceedings above set forth.

The testimony at the time of its being offered was objected to by plaintiff as irrelevant and immaterial; the objection was overruled, the testimony admitted and the plaintiff excepted.

The defendants rested.

528 The plaintiff then offered in evidence the stipulation in the case of The People of the State of California at the relation of George T. Bohen, *vs.* S. W. Holladay, *et al.;* which had originally been offered by defendants and afterwards withdrawn as hereinbefore stated, dated July 18, 1864, and filed February 19, 1876, and also the judgment hereafter set forth, dated February 19, 1876, and in connection with these offers asked W. C. Burnett first sworn as a witness who was attorney and counsellor for the city and county of San Francisco in February, 1876, if he ever saw or heard of that stipulation, and if he ever had any knowledge of the entry of the judgment of February 19, 1876, which is in these words:

(Title of Court and Cause.)

IN PEOPLE *ex Rel.* BOHEN
vs.
HOLLADAY.

Judgment.

This cause having come on regularly for trial before the court without a jury, a trial having been heretofore expressly waived by the parties in open court, the cause was tried by the court sitting without a jury; and witnesses for the respective parties having been duly sworn and examined and certain documentary evidence
529 haveing been read in evidence and the cause duly submitted to the court upon briefs of the respective counsel.

And after due consideration thereof, the court having afterwards on the eleventh day of July, 1864, rendered its decision thereon, upon all the issues against the plaintiffs, and in favor of the defendants, and ordered the injunction theretofore issued in the cause against the defendants to be dissolved and directed in said order counsel to draw findings.

And the counsel herein having by their stipulation in writing filed herein expressly waived written findings and consented that judgment be entered without written findings pursuant to the order and decision of the court; it is now therefore by the consideration of the court ordered, adjudged and decreed that the plaintiff take nothing by this action; but that the defendant Samuel W. Holladay, was at the time of the commencement of this suit, and is in

the true and lawful possession as the owner thereof, of so much of the land and premises described in the complaint as is claimed and described in his answer as "the six fifty-vara lots lying three of them on each side of Clay street between Gough and Octavia
530 streets," which lots are situated in the city and county of San Francisco, and are otherwise bounded as follows:

First. On the north by Clay street, on the east by Gough street, on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Second. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street; and on the west by Octavia street.

That as to said parcels of land last above described as "First" and "Second," it is adjudged and decreed that the defendant Samuel W. Holladay was from the month of February, 1854, in the actual use, occupation and possession of the same as the owner thereof, as against the plaintiffs, and so continued owner to the time of the commencement and trial of this suit, with his fences and improvements thereon, and that the said land never was nor has been by the lawful owner or proprietor thereof, lawfully nor in any way dedicated to, accepted or used by the public as a public square or plaza, or for any public use, but that the same was all that time and is the private property and in the actual and lawful pos-
531 session of the defendant Samuel W. Holladay, free and clear from all dedication to public uses whatsoever.

It is further adjudged that the defendant Hazard P. Herrick (who in the complaint is called by the fictitious name of John Doe) and the defendant A. P. Anderson had not, at the time of the commencement of this suit, or any other time, any right or claim to any of the premises, except as servants and workmen under and in the employ of defendant Holladay. And it is further adjudged and decreed that the defendant S. W. Holaday has not nor has he had at any time prior to the time of the commencement of this suit any right or title in or to or the possession of any part of the premises described in the complaint, consisting of four blocks, bounded by Washington, Gough, Sacramento and Laguna streets, except six fifty-vara lots mentioned in his answer and embraced in the parcels "First" and "Second" hereinabove described.

February 19th, 1876.

R. F. MORRISON, *Judge.*

Decree recorded February 23, A. D. 1876, Book M, page 79.

The counsel for the city stating at the time of the offer of
532 the evidence that he wished and expected to show by said witness and the testimony of S. W. Holladay, that said stipulation was not signed when it bore date, that the said judgment in the said case had not been procured in good faith, but had been entered without the knowledge of the city attorney on the motion of S. W. Holladay and by consent in writing signed by F. M. Pixley, whose authority as attorney general had ceased.

The defendants objected that the record could not thus be collaterally attacked, and that the testimony was irrelevant.

The court sustained the objection and excluded the oral evidence, and said stipulation, to which the plaintiff at the time excepted. It appeared at this trial that the land in dispute in the present action is the same land as was in dispute in the other two actions in the fourth district court, numbered respectively 11029 and 11963 hereinbefore set forth.

The case was then closed, and afterwards the court made its decision and the plaintiff in proper time and form gave notice of its intention to move to vacate the decision, and that a new trial be granted, and its notice stated as one of the grounds on which
533 it would move error of law occurring at the trial and excepted to by the plaintiff, now under said ground specifies:

First. That the court erred in allowing the defendants to withdraw the stipulation signed by S. W. Holladay and F. M. Pixley, dated July 18, 1864, from the judgment-roll offered by it in the case of The People at the relation of George T. Bohen *vs.* S. W. Holladay *et al.*, and the judgment of the 19th of February, 1876, and in admitting in evidence the residue of the said judgment-roll without said paper, and in admitting the testimony of E. D. Sawyer and George T. Bohen in regard thereto.

Second. The court erred in refusing to allow the defendant S. W. Holladay to be asked as a witness when said stipulation was in fact signed.

Third. The court erred in excluding said stipulation when afterwards offered by plaintiff and in refusing to allow the plaintiff to show by W. C. Burnett, that he had never heard of said stipulation—and that the entry of the judgment in said action, dated February 19, 1876, was without his knowledge, and in refusing to allow the testimony that said stipulation was not in fact signed at the time it bore date.

Fourth. It was error in law for the court to admit, against
534 the objection of the plaintiff the alleged judgment and a part only of the alleged judgment-roll in the case of The People of the State of California at the relation of George T. Bohen *vs.* S. W. Holladay *et al.*

Fifth. It was error in law for the court to admit in evidence against the objection of the plaintiff, the record in the case of S. W. Holladay *vs.* The City and County of San Francisco.

Sixth. It was error in law to admit against the objection of plaintiff the judgment in the case of The People at the relation of A. J. Bryant *vs.* S. W. Holladay *et al.* and in the said notice, the plaintiff having specified as one of the grounds of said motion that the evidence is insufficient to justify the decision of the court; and the plaintiff now having specified in its notice amongst the grounds of its motion that the evidence was insufficient to justify the decision, now under said grounds specifies as follows:

First. That the evidence is insufficient to justify the finding, that the questions of title and dedication, or of either of the same, in this case involved, were tried or determined in favor of S. W. Holladay

and against the plaintiff in the action No. 11029 of The People of the State of California *vs.* S. W. Holladay *et al.*, commenced
535 November 16, 1863, in the fourth district court, but said evidence shows that said question of title and dedication were not in issue in that action.

Second. The evidence is insufficient to justify the finding that the same title and that same question of dedication to public use and occupation were litigated and adjudicated in that action as in this action, but the evidence showed that the title relied upon and put in issue in this action was then held by the United States, and did not pass to plaintiffs until after issue had been joined in said case of The People *vs.* S. W. Holladay *et al.*, No. 11029, and until after the said cause had been submitted.

Third. The evidence is insufficient to justify the finding that the said action No. 11029 was commenced at the instance of the plaintiff, or was managed or conducted in the interest of the plaintiff as by her attorney or officers on her behalf.

Fourth. The evidence is insufficient to justify the finding that all and singular or that any of the matters in issue in this action, or any of the questions of title or dedication involved therein, were heretofore heard, tried or determined, or finally adjudicated in any way, or determined in favor of said S. W. Holladay, or against
536 the plaintiff in the action commenced December 17, 1864, in the fourth district court, and numbered 11963, wherein Samuel W. Holladay was plaintiff and The City and County of San Francisco defendant, but the evidence showed that the said court had no jurisdiction in said case No. 11963 to hear, try, pass or adjudicate upon or determine in any manner the matters in issue in this case, but that said action was an attempt to obtain a judgment against the people of the State of California, in the courts of the State, against the will and permission of the State, and that the attempted judgment in said action numbered 11963 was void and not binding upon the plaintiff or any person.

Fifth. That the evidence is insufficient to justify the finding, that in the said action No. 11963 it was, on the 25th day of September, 1867, or at all, adjudicated or decreed, or adjudged by the court, that said Holladay was the owner in fee-simple absolute, or at all, of an undivided nineteen-twentieths; or any interest in the lands in the amended complaint in this action described, or that he was entitled to the possession thereof, or that the plaintiff did not have any right therein: but the evidence showed that the said attempted judgment was void and not binding on the plaintiff or the people of the State of California.

537 Sixth. The evidence is insufficient to justify the finding that the same land is in controversy in this action which was in controversy in said actions numbered 11029 and 11963.

Seventh. The evidence is insufficient to justify the finding that the plaintiff caused to be commenced action No. 11459, in the 15th district court of California, for the city and county of San Francisco, wherein The People of the State of California, at the relation of A. J. Bryant, were plaintiffs, and S. W. Holladay and others were

defendants, or that the said action was managed or conducted in the interest of the plaintiff in this action, or by the officers or attorneys of the plaintiff, or that the same question of title or dedication to public use and claim of title by defendants were in issue or controversy, or were tried or adjudicated in the said last-named action as in this; that the evidence shows that the said action was between different parties, and for a different subject-matter from the parties and subject-matter involved in the present action.

Eighth. The evidence is insufficient to justify the finding that the plaintiff never demanded possession of the premises in controversy of the defendants, or that the defendants never refused possession thereof to the plaintiff.

538 The foregoing bill of exceptions having been agreed to by the parties, the same is hereby settled and certified to be correct and is allowed.

T. H. REARDEN, *Judge.*

November 28th, 1884.

(Endorsed:) Filed Nov. 28, 1884. William T. Sesnon, clerk, by J. Steppacher, deputy clerk.

(Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Order Denying Motion for New Trial.

DECEMBER 12TH, 1884.

This day came on for hearing the motion of plaintiff for a new trial, J. H. Meredith, Esq., appearing as attorney for plaintiff and S. W. Holladay, Esq., appearing as attorney for defendants, and the motion being submitted for decision and the court being fully advised in the premises, it is now hereby ordered that plaintiff's motion for a new trial herein be and the same is hereby denied.

539 (Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY.

Notice of Appeal.

Please take notice that the plaintiff appeals to the supreme court of this State from the order of said superior court made on the 12th day of December, 1884, refusing the motion of the plaintiff for a new trial herein.

Dated this 23d day of December, 1884.

WILLIAM CRAIG,
City and County Attorney, Attorney for Plaintiff.

To the clerk of said superior court and S. W. Holladay, Esq., attorney for defendants.

(Endorsed:) Service by copy of within original admitted this 23d day of Dec., 1884. S. W. Holladay. Filed Dec. 23d, 1884. Wm. T. Sesnon, clerk, by —— ——, deputy clerk.

540 (Title of Court and Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY. } No. 10975.

Judgment.

JUNE 28TH, A. D. 1884.

This cause came on regularly for trial, William Craig, Esq., appearing as counsel for the plaintiff, and S. W. Holladay, Esq., for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury:

Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined and certain documentary evidence introduced, the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court delivers its finding and decision in writing, which is filed and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that The City and County of San Francisco, plaintiff, do take nothing by this action as against S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of the last will of S. L. Mastick, deceased, and R. G. Davis-
541 son, defendants; but that judgment be and the same is hereby entered herein in favor of said defendants, and that the said defendants do have and recover of and from said plaintiff their costs and disbursements incurred in this action amounting to the sum of thirty-four and $\frac{50}{100}$ dollars ($34.50).

Recorded July 25, A. D. 1885.

Book 2, page 622, dep't 7.

Remittitur.

In the Supreme Court of the State of California.

(Title of Cause.)

IN SAN FRANCISCO
vs.
HOLLADAY. } No. 9934. In Bank. On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and sin-

gular the law and premises having been fully considered, the opinion of the court herein is delivered by—

PATERSON, *J.*

We concur:

SHARPSTEIN, *J.*
McFARLAND, *J.*
SEARLS, *C. J.*
THORNTON, *J.*

Whereupon, it is adjudged and decreed by the court that
542 the order of the superior court in and for the city and county of San Francisco, in the above-entitled cause, be and the same is hereby affirmed.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 28th day of April, 1888, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 29th day of May, A. D. 1888.

[SEAL.]

J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy*.

(Endorsed:) "Filed May 29th, 1889. J. D. Spencer, clerk, by Frank Myers, deputy." "Recorded in Minute Book 41, dep't 7, page 268. June 21st, 1888."

The plaintiffs objected to the said record, and to the said papers offered from the record and files in the said case of The City and County of San Francisco *vs.* S. W. Holladay *et al.* on the following grounds, to wit:

That the same and every part thereof, are irrelevant to
543 any issue in this action, because the plaintiffs in this case are strangers to the said record—never authorized the institution of the suit, and never authorized any one to submit the rights of the people to adjudication therein.

That to hold the said judgment in the said action to be a defense to this action would be to deprive the people of the rights in the land in controversy, granted to them by the act of Congress, approved July the 1st, 1864, and entitled An act to expedite the settlement of titles to lands in the State of California, and derived by them under the *the* act of Congress, approved March 8th, 1866, entitled An act to quiet land titles in California; and under an act of Congress, approved March 3rd, 1851, entitled An act to ascertain and settle private land claims in California; and under the acts of Congress amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights secured by the Constitution of the United States, and especially by the 5th and 14th amendments thereof.

And further, that the people having themselves, through their attorney general, instituted the present action, even if in any event,

the people could have been bound by a judgment rendered in a case instituted by the city and county of San Francisco, against the same defendants, this court and its predecessors, the district
544 court, had equal jurisdiction of the subject-matter, and could not be ousted of its jurisdiction, or bound by a subsequent action, which the people of the State did not institute.

Which objections were by the court overruled, and the evidence was admitted, to which ruling the plaintiff at the time excepted.

Further Evidence in Defense.

Defendant S. W. HOLLADAY, called as a witness for defendants, testified:

That in the year 1854, he and his cotenants in common, Phillip W. Shepheard and Charles R. Saunders, were in the exclusive occupation and actual possession of, and claiming the title to a tract of land bounded and described as follows: On the north by a line midway between Clay and Washington streets, on the south by a line midway between Clay and Sacramento streets, on the east by a line a little east of where Van Ness avenue now is, and on the west by a line at about the middle of Octavia street.

That such possession and claim was continued in exclusive occupation by said parties, and by S. W. Holladay, as their grantee, until and after March 11th, 1858; during all said time hav-
545 ing the same enclosed, by strong and substantial board fences, and having erected houses and buildings thereon, and living and residing thereon.

That he knew the property since the spring of the year 1850; that the land in question is a part of the so-called "Stevenson claim," which was fenced in May, 1850, by a strong, substantial board fence, by Ensign and others, claiming under said "Stevenson claim," interested in the property, who built a house upon it, which house is still extant.

That said "Stevenson claim" was a tract of land laid down generally by that name on the maps of the city before the Van Ness map was made. It was and is as well known as any possessory tract in the city. That he (said Holladay) was well acquainted with said tract ever since the year 1850.

That in the summer of the year 1854, he and his then cotenants, one Charles R. Saunders and Philip W. Shepheard, built a fence around the larger tract of land above described, including the land in dispute, a strong, expensive board fence, capable of turning stock of any kind; and in the fall of that year they built a house on the land costing $1,133; that Holladay and Saunders then went and lived in the house and made it their domicile.

They also built on the land a stable and kept two horses
546 in it. They dug a well, ninety feet deep and made a garden there, and kept ducks, and geese, and chickens, and turkeys. Holladay, Shepheard and Saunders, held and claimed the tract together, as tenants in common.

Holladay and Saunders continued to live there more than a year,

when Holladay went east and left Saunders, who continued to live there until Shepheard moved in with his family of wife and ten children, and he resided there some ten or twelve years.

That afterwards he (Holladay) succeeded to the interest of Shepheard and Saunders in the disputed premises, and that ever since the beginning of such possession in 1854, and down to the time of the institution of this action, these defendants and their grantors and predecessors in interest have been in the continuous, uninterrupted, absolute and adverse possession of said land.

Mr. Holladay further testified that in the summer of the year 1869 he caused a well to be dug on the disputed premises, one hundred feet deep; that in the fall, or winter of that year, he built a stable, and in the spring of 1870, he had completed a house, which, with the other improvements named, cost him some $15,000.00; that he moved into the house with his family about May 1st, 1870, and has lived there ever since.

To every part of the testimony of said Holladay the plain-
547 tiff objected, when the same was offered, that it was immaterial and irrelevant to any issue in the cause, which objection the court overruled. To this ruling the plaintiffs at the time excepted.

Mr. Holladay also testified that the land here in dispute was a part of what was known and laid down upon the maps and surveys as the "Stevenson claim."

Plaintiffs introduced and read in evidence the original record of the said Stevenson claim made March 3rd, 1849, and recorded March 3rd, 1849, in Liber 2 of Miscellaneous Records (old series) page 65. The same having been originally recorded in the office of the municipal clerk of San Francisco, and now produced in evidence from the custody of the city and county recorder. Said Stevenson claim being in form and effect a notification to the public that the said subscriber J. D. Stevenson had that day entered into the quiet and peaceable possession of the tract of land therein described including the premises in question.

Immediately following the record of said Stevenson claim is this entry, viz:

"A true copy, Henry Gillingham, municipal clerk, May 4th, 1849, filed for record May 4th, 1849. The above record exists with-
548 out prejudice to the rights of persons claiming any part of the foregoing-described land under grants made by the alcalde of this district, previous to this date May 4th, 1849. Office of alcalde, T. M. Leavenworth, alcalde for district San Francisco, U. Cal."

Defendants introduced and read in evidence a deed, dated May 28th, 1850, from Jonathan D. Stevenson to James P. Howard; duly signed and acknowledged; recorded in Book B of Deeds, pages 99 and 100; including within its grant the premises here in dispute, and conveying to said grantee an undivided (¾) three-fourths part of the Stevenson claim aforesaid.

Defendants also introduced and read in evidence a deed dated February 18th, 1851, from Levi Parsons to Philip W. Shepheard

duly signed and acknowledged on the same day, and recorded December 10th, 1851, in Liber 141 of Deeds, page 447. Whereby said Parsons released and quitclaimed to said Shepheard all his interest, to wit, an undivided one-eighth of the land granted as above by Stevenson to Howard, and embracing the property here in dispute.

Defendants also offered and read in evidence a decree of the probate court in the estate of James P. Howard, deceased, made March 13th, 1854, and signed "J. D. Creigh, probate judge," and
549 filed the same day; wherein it was recited and adjudged that said Jas. P. Howard at the time of his death was holding said land known as the Stevenson claim under deed from J. D. Stevenson to him, but in trust for John Satterlee, one-fourth; S. C. Hastings, one-fourth; and Levi Parsons, one-eighth; and whereby, in execution of said trust, John Satterlee, the administrator of the estate of James P. Howard, deceased, was authorized and directed to execute to Orlando C. Osborne, the grantee of said Hastings, a conveyance of one-fourth; to William S. Reese, the grantee of said Satterlee, a conveyance of one-fourth; and to Philip W. Shepheard, the grantee of said Parsons, a conveyance of one-eighth of a certain tract of land described therein; being the same tract which had been by deed conveyed by Jonathan D. Stevenson to Jas. P. Howard, May 28th, 1850, above referred to—which tract of land embraced the premises here in dispute.

In connection with the decree last named, defendants offered and read in evidence, a deed of conveyance, duly executed under said decree from John Satterlee, administrator of the estate of James P. Howard, deceased, to Orlando C. Osborne, William S. Reese and Philip W. Shepheard, dated March 15th, 1854, and recorded in Liber 41 of Deeds, page 38—whereby said grantor did grant, bargain, sell and convey to Orlando C. Osborne, one undivided
550 one-fourth; to William S. Reese, one undivided one-fourth; and to Philip W. Shepheard, one undivided one-eighth of the same tract of land that J. D. Stevenson had conveyed to Jas. P. Howard by the above-mentioned deed May 28th, 1850; being the said Stevenson claim above described and embracing the land here in dispute.

Defendants next offered and read in evidence a deed of partition, between Jonathan D. Stevenson, Orlando C. Osborne, William S. Reese and Philip W. Shepheard; dated April 10th, 1854, duly executed, and recorded April 14th, 1854, in Liber 41 of Deeds, page 50: whereby the parties partitioned among themselves said "Stevenson claim," and set off and conveyed to Philip W. Shepheard, "all that portion thereof lying south of a line equidistant and parallel between the lines of Clay and Washington streets, when extended west;" embracing the land here in dispute.

Mr. Holladay testified that after said last-named deed, there was a partition in fact on the ground amongst the parties, that he and Shepheard and Saunders then by consent of all the parties took possession of the tract in said partition deed assigned to Shepheard—and it was then that they built their fence upon their part of said

tract last before described, including the land in dispute;
551 that is, in the latter part of April, 1854: and that they entered and ever since that time occupied and claimed said land under said deeds above named.

Their north fence was built on the line midway between Clay and Washington streets; the east fence about where Van Ness avenue is now—a little to the east of it; the south fence on a line midway between Clay and Sacramento stre-ts; the west fence at Octavia street. And after said fence was built, Holladay, Shepheard and Saunders claimed and occupied said tract as tenants in common, and built the house upon it, and lived there as hereinbefore stated.

Defendants also offered and read in evidence a deed dated June 5th, 1854, duly signed and acknowledged; and recorded in Liber 70 of Deeds, page 268—from Philip W. Shepheard to Samuel W. Holladay and Charles R. Saunders, whereby he granted, bargained, sold and conveyed to them an undivided one-half interest in the tract of land which had been set apart to him by said partition deed, and fenced as aforesaid, and embracing the land in dispute herein.

Defendants also offered and read in evidence a deed dated April 12th, 1857, recorded August 1st, 1857, in Liber 70 of Deeds, page 269; from Charles R. Saunders to Samuel W. Holladay, grant-
552 ing and conveying to him all his (Saunders') right, title and interest in the tract fenced as before described; and embracing the land here in dispute.

Defendants then offered and read in evidence a partition deed, dated June 22d, 1861, duly signed, and acknowledged the same day—recorded December 10th, 1861, Liber 141 of Deeds, page 441, between Philip W. Shepheard and Samuel W. Holladay, segregating their interests in said tract of land originally conveyed to Shepheard by the partition deed above mentioned, and fenced as above stated, whereby said Shepheard granted and conveyed to said Holladay in severalty, a one-half part of said tract, embracing the land now in dispute.

Defendants also offered and read in evidence a deed of quitclaim from William S. Reese to Philip W. Shepheard and Samuel W. Holladay, dated December 7th, 1861, and recorded December 19th, 1861, in Liber 145 of Deeds, page 432, granting to them all the right, title and interest which he had acquired by virtue of the deed from John Satterlee, executor of the estate of Jas. P. Howard, deceased, as above set forth—in and to all that tract embraced within the J. D. Stevenson claim, which lies south of the line midway between and parallel with the streets known as Clay and Washington streets—and embracing the land in dispute herein.

Defendants also offered and read in evidence a deed of conveyance from Philip W. Shepheard to Samuel W. Holladay,
553 dated Oct. 10th, 1863; recorded in Liber 640 Deeds, page 110, conveying to S. W. Holladay a tract of land embracing one lot of the premises in dispute herein.

Defendants next introduced in evidence a gift deed of conveyance from Samuel W. Holladay to his wife Georgiana C. Ord Holladay, dated May 5th, 1869; recorded May 8th, 1869, in Liber 506 of Deeds,

page 157, conveying to her those parts of the premises in dispute which are by her claimed and described in her answer herein.

Defendants next introduced and read in evidence a deed of conveyance from Samuel W. Holladay to Henry H. Haight, dated October 19th, 1868; recorded October 20th, 1868, in Liber 466 of Deeds, page 127, conveying to said Haight that part of the premises in dispute herein which is by defendant Davisson claimed and described in the answer herein.

Defendants next introduced and read in evidence a deed of conveyance from Henry H. Haight to R. G. Davisson, one of the defendants herein, dated February 16th, 1869; recorded February 18th, 1869, in Liber 480 of Deeds, page 361, conveying to said Davisson that part of the land in dispute herein, which is by him claimed and described in his answer herein.

Defendants next introduced and read in evidence a deed of conveyance from Samuel W. Holladay to Seabury L. Mastick,
554 dated July 16th, 1868, and recorded August 5th, 1868, in Liber 450 of Deeds, page — conveying to said Mastick all that part of the premises here in dispute which are by the administratrix of the estate of said Seabury L. Mastick, claimed and described in the answer herein.

W. C. BURNETT, called for defendants, testified: That he was the duly elected and official attorney and counsellor of the city and county of San Francisco at the time of the institution of this action, and that he applied to and received from the attorney general of California leave to bring this action, and did bring it, after and assuming to act under the resolution of the board of supervisors, already in evidence, had been passed, directing him to test the rights of S. W. Holladay *et als.* to the part of the tract of land called Lafayette park occupied by them.

Witness decided for himself, and commenced the present suit in the name of the People of the State of California.

He exercised his own judgment about that.

While he was such city attorney he prepared the complaint herein, sent to the attorney general for authority to sue in the name of The People by the attorney general against S. W. Holladay, *et al.* as to certain lands; got the authority (saying): Think we filed a
555 bond for costs with the attorney general, which he required, to commence the suit in the name of the people of the State; identified the above-mentioned permission to sue, given by Jo. Hamilton, attorney general, theretofore put in evidence, and said this was the suit so brought under such authority.

With this testimony the defendants rested.

The plaintiff in rebuttal put in evidence an order of the said fourth district court, in the said case of The People at the relation Bohen *vs.* S. W. Holladay *et al.*, which is as follows:

(Title of Court and Cause.)

TUESDAY, *April* 21*st*, 1864.

"This cause came on regularly for trial, in its order upon the calendar, Mr. Saunders appearing as attorney for plaintiff, and Mr. Holladay as attorney for the defendants, and a trial by jury having been heretofore expressly waived by parties in open court, the cause was tried by the court, sitting without a jury. Whereupon Chas. H. Gough, a witness for the plaintiff, being duly sworn and examined, and after reading certain documentary evidence, the testimony closed, and the cause was submitted to the court, without argument, upon briefs to be filed."

Minute Book "G," p. 287.

556 And a further order in said cause as follows:

(Title of Court and Cause.)

MONDAY, *July* 11*th*, 1864.

"This cause, heretofore tried by the court, sitting without a jury, and submitted for consideration and decision, having been duly considered, it is ordered by the court that a finding be drawn herein in favor of the defendants and against the plaintiff, and that the injunction heretofore issued herein be and the same is hereby dissolved; counsel to draw finding."

Entered in Minute Book "G," p. 382.

And the court having afterwards, to wit, on the 23rd day of January, A. D. 1893, given its decision in writing against the plaintiffs and in favor of the defendants, and the plaintiffs having in due time and form of law, given notice of their intention to move the court to vacate its said decision and grant the plaintiffs a new trial herein, and in their said notice having designated as one of the grounds on which the said motion would be made, that the evidence was insufficient to justify the decision, now under said ground specify:

First. That the evidence was insufficient to justify the finding, or decision; that the lands described in the defendants' answer herein, or in controversy in this case, are included in, or are the
557 same lands or any part of the same lands described in the complaint of the plaintiffs, in the action of The People at the relation of Bohen *vs.* S. W. Holladay; but the evidence shows that the land described in the said answers consists of two parcels, one described as bounded on the west by the east line of Octavia street, on the north by a line midway between Washington and Clay streets, on the south by the north line of Clay street and on the east by the west line of Gough street; and the other parcel described as bounded on the north by the south line of Clay street, on the west by the east line of Octavia street, on the south by a line midway between Clay and Sacramento streets, and on the east by the west line of Gough street; and the evidence further shows, that

neither Octavia nor Clay street, passes through or touches the tract of land laid down on the map known as the Van Ness map of San Francisco, as Lafayette park, or passes through or touches the land described in the complaint in this action, and that there is no line on said Lafayette park, or on the lands described in the complaint herein, midway between Washington and Clay streets, or midway between Clay and Sacramento streets.

Second. The evidence is insufficient to justify the finding, or decision, that the land in controversy in this case, and described in the answers of the defendants in this action, are the same lands,
558 or any part of the same lands described in the complaint and judgment in the case of Samuel W. Holladay *vs.* The City and County of San Francisco, hereinbefore at large set forth; on the contrary, the evidence shows that the lands described in the last aforesaid complaint and judgment, consist of two parcels, one of which is therein described as commencing where the southerly line of Clay street intersects the west line of Gough street; thence running westwardly along the southerly line *line* of Clay street, four hundred and twelve and a half (412½) feet to the easterly line of Octavia street; thence southwardly along the last-named line, one hundred and thirty-seven and a half (137½) feet, more or less, to a point midway between Clay and Sacramento streets; thence at right angles eastwardly, parallel with and midway between Clay and Sacramento streets, four hundred and twelve and a half (412½) feet to the west line of Gough street; thence northwardly along the last-named line one hundred and thirty-seven and a half (137½) feet, more or less, to the point of beginning; and the other parcel is therein described, as commencing where the northerly line of Clay street intersects the westerly line of Gough street; thence west, along the northerly line of Clay street 412½ feet, to the easterly line of Octavia street; thence northwardly along the last-named
559 line 137½ feet to a point midway between Clay and Washington streets; thence eastwardly, parallel with and midway between Clay and Washington streets 412½ feet to the west line of Gough street; thence southwardly, along the last-named line 137½ feet to the place of beginning;

And the evidence further shows that there is no point on the land described in the plaintiffs' complaint in this action or on said Lafayette park, where either the north or south line of Clay street intersects the west line of Gough street, or midway between Sacramento and Clay streets, or midway between Clay and Washington streets.

And the evidence further shows that neither Sacramento nor Clay street passes through or touches the said land laid down on the Van Ness map of San Francisco, as Lafayette park, or touches or passes through the lands described in the complaint in this action; and that there is no line on said Lafayette park, or on the lands described in the complaint in this action, midway between Clay and Sacramento streets, or midway between Clay and Washington streets.

Third. The evidence is insufficient to justify the decision or find-

ing, that the lands described in the complaint in the case of The City and County of San Francisco *vs.* S. W. Holladay and
560 others, hereinbefore set forth and in controversy in that case, are the same lands, or any part of the same lands described in the complaint in this present action, or in controversy herein; on the contrary, the evidence shows that the land described in the complaint of The City and County of San Francisco *vs.* S. W. Holladay and others, consists of two parcels described:

Parcel one. Bounded on the north by Clay street; on the east by Gough street; on the south by a line midway between Clay and Sacramento streets, and on the west by Octavia street.

Parcel two. Bounded on the north by a line midway between Clay and Washington streets; on the east by Gough street; on the south by Clay street, and on the west by Octavia street.

And the evidence further shows that neither Clay street nor Octavia street passes through or touches the Lafayette park, or the lands described in plaintiffs' complaint in this present action, and there is no line midway between Clay and Washington streets or midway between Clay and Sacramento streets, passing through or touching Lafayette park, or touching the lands in controversy in this action.

Fourth. The evidence is insufficient to justify the finding or decision, that the question whether the lands described in the
561 complaint in this action, or in controversy in this case, were ever dedicated to the public, as a public park, was in issue or litigated in the said action of S. W. Holladay *vs.* The City and County of San Francisco, and therein adjudged and determined, adversely to the plaintiffs, and now is *res judicata*, on the contrary, the evidence shows that the plaintiffs in this action were neither directly nor indirectly, parties or privies to the said action of S. W. Holladay *vs.* The City and County of San Francisco, and are unaffected thereby; and that the rights of the people and of the public in or to the lands in the complaint in this action described, or in controversy herein, or to any part thereof, were not put in issue, nor passed upon, nor adjudged nor determined, in said action of S. W. Holladay *vs.* The City and County of San Francisco.

Fifth. The evidence is insufficient to justify the finding or decision, that the question whether the lands described in the complaint in this action, or in controversy therein, were ever dedicated to the public, as a public park, was litigated, in the said action of The City and County of San Francisco *vs.* S. W. Holladay and others, and therein adjudged and determined adversely to the plaintiffs, and now is *res judicata;* on the contrary, the evidence shows that
562 the plaintiffs in this action were neither directly, nor indirectly, parties or privies to the said action of The City and County of San Francisco *vs.* S. W. Holladay and others, and that they are unaffected thereby, and that the rights of the people, and of public, in or to the lands described in the complaint in this action, or in controversy herein, or to any part thereof, were not put in issue nor passed upon, nor adjudged, nor determined in said action of The City and County of San Francisco *vs.* S. W. Holladay and others; and further, the evidence shows that the present action

was commenced March 5th, 1878, in the district court of the fifteenth district of the State of California, and that the defendants in the said action, on the 11th of April, 1878, filed their answer to the original complaint therein, and that afterwards the action was properly transferred to the superior court of the city and county of San Francisco; that the said action of The City and County of San Francisco against S. W. Holladay and others, was commenced on the 23rd day of October, 1883, without the knowledge or consent of the plaintiffs herein, and that this present action and the rights of the public therein asserted, are unaffected by the said action of The City and County of San Francisco *vs.* S. W. Holladay and others, or by the judgment therein rendered.

563 And the plaintiffs in the said notice of their intention, to move to vacate the said decision of the court, having designated as one of the grounds of their motion, errors in law occurring at the trial, and excepted to by plaintiffs; now under said grounds specify:

First. It was error in law for the court to admit in evidence, the judgment-roll in the case of The People of the State of California at the relation of George T. Bohen *vs.* S. W. Holladay and others, against the objection of the plaintiffs that the same was irrelevant and immaterial, to any issue in this action, for the reason that the issue in the said action of The People at the relation of Bohen *vs.* S. W. Holladay and others was joined, and the case was submitted for decision before the first day of July, 1864, the date at which the plaintiffs herein and the public, acquired their rights to the lands described in the complaint in this action.

Second. It was error in law for the court to admit in evidence the judgment-roll in the case of Samuel W. Holladay *vs.* The City and County of San Francisco, hereinbefore set forth, against the objections of the plaintiffs, which were as follows:

(1.) That the said judgment-roll was irrelevant and immaterial to any issue in this action, for the reason, that the plaintiffs
564 in this action are strangers to the record, in which said judgment was given, were never served with process therein, never authorized the submission of the rights of the public in said lands to adjudication in said action;

(2.) That to hold the said judgment, in whole or in part to be a defense to this action, would be to deprive the people and the public of the rights in the lands described in the complaint in this action, granted to them by the act of Congress of July 1st, 1864, and derived by them under the act of March 3rd, 1851, to ascertain and settle private land claims in California, and the acts amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights, given by the Constitution of the United States, and especially by the 5th and 14th amendments thereof.

Third. It was error in law for the court to admit in evidence, the judgment-roll in the case of The City and County of San Francisco *vs.* S. W. Holladay and others, hereinbefore set forth, against the objections of the plaintiff as follows:

(1.) That the said judgment-roll was immaterial and irrelevant to any issue in this action, for the reason that the plaintiffs in this action, are strangers to the record in which said judgment was given, were never served with process therein; never au-
565 thorized the submission of the rights of the public in said lands to adjudication in said action;

(2.) That to hold the said judgment in whole or in part to be a defense in this action, would be to deprive the people and the public of the rights in the lands described in the complaint in this action, granted to them by the act of Congress of July 1st, 1864, and derived by them under the act of Congress of March 3rd, 1851, to ascertain and settle private land claims in California, and the acts amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights, secured by the Constitution of the United States, and especially by the 5th and 14th amendments thereof.

The plaintiffs in their notice having stated as one of the grounds of their motion, that the decision is against law, now specify that said decision by right of law should have been for the plaintiff.

The foregoing statement on motion for new trial was proposed in time and on proper notice is hereby settled and allowed this 31st day of March, A. D. 1893.

J. C. B. HEBBARD, *Judge.*

566 (Endorsed:) "Service of a copy of the within proposed statements for a new trial admitted this 10th day of February, A. D. 1893. S. W. & E. B. Holladay, W. C. Belcher, attorneys for defendants. Filed Mar. 31, 1893. M. C. Haley, clerk. By J. M. Sullivan, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late 15th District Court.

Notice of Appeal from Judgment.

To all the defendants in this action and Messrs. Samuel W. Holladay, E. B. Holladay, Mastick, Belcher & Mastick, their attorneys, and to the clerk of the above-named court:

You are hereby notified that the plaintiffs appeal to the supreme court of the State of California from the whole of the judgment given in this action, and entered on the 26th day of January, 1893.

W. H. H. HART,
Attorney General.
WM. MATTHEWS,
CRAIG & MEREDITH,
Attorneys for Plaintiffs.

567 (Endorsed:) "Copy received this 24th of March, 1893. S. W. and E. B. Holladay, Mastick, Belcher & Mastick, attorneys for defendants." "Filed Mar. 24, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk."

(Title of court and cause.)

No. 10459. In Late 15th District Court.

Notice of Hearing Motion for New Trial.

To all the defendants in this action and to Messrs. S. W. & E. B. Holladay and Mastick, Belcher & Mastick, their attorneys:

Please take notice that on Friday, the 7th day of April, 1893, at ten o'clock in the morning, at the court-room of department four of said court, in the city hall of said city and county, the plaintiffs will present their motion for a new trial upon the pleadings in the action, their notice of intention to move for a new trial, and the statement in support thereof.

568 Said motion will be made upon the grounds specified in said notice of intention, and upon the assignments of error made in said statement.

W. H. H. HART,
Attorney General.
CRAIG & MEREDITH,
WILLIAM MATTHEWS,
Of Counsel for Plaintiffs.

(Endorsed:) "Rec'd a copy of within this 1st day of April, 1893. S. W. & E. B. Holladay, W. C. Belcher, attorneys for def'ts." "Filed Apr. 7, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late 15th District Court.

Order Denying Plaintiff's Motion for a New Trial.

TUESDAY, *April 7th*, 1893.

569 In this action the motion of Messrs. Matthews and Meredith, attorneys for plaintiff, for a new trial, coming on to be heard this day. It is ordered said motion be and the same is hereby submitted to the court for consideration and decision, and taken under advisement; and it is further ordered that said motion be and the same is hereby denied.

(Minute Book, dep't 4, page 142.)

(Title of Court and Cause.)

No. 10459. In Late 15th District Court.

Bill of Exceptions to Order Denying Plaintiff's Motion for a New Trial.

Be it remembered that on this 7th day of April, 1893, the motion of the plaintiff for a new trial, came on regularly to be heard; and there were considered on said hearing the pleadings, the decision,

the judgment, the notice of intention to move for a new trial, the statement on motion for new trial, and the notice of the hearing of said motion, all of which were shown to have been duly served and filed;

Thereupon the court made an order denying said motion, and the plaintiff excepted on the ground of error of law, and the
570 court now allows and settles this bill of exceptions and makes it a part of the record.

April 7th, 1893.

J. C. B. HEBBARD, *Judge.*

(Endorsed:) "Filed April 7, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk."

(Title of Court and Cause.)

No. 10459. In Late 15th District Court.

Notice of Appeal from Order Denying Plaintiff's Motion for a New Trial.

The defendants will please take notice that the plaintiff appeals from the order made herein on the seventh day of April, 1893, denying the motion of the plaintiff for a new trial to the supreme court of the State of California.

W. H. H. HART,
Attorney General, Attorney for Plaintiff.
WILLIAM MATTHEWS AND
CRAIG & MEREDITH, *Counsel.*

571 (Endorsed:) "Service of copy of within notice is admitted April 20th, 1893. S. W. & E. B. Holladay, Mastick, Belcher & Mastick, attorneys for defendants." "Filed Apr. 20, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk."

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated that the foregoing transcript on appeal is full, true and correct, and that same may be used in the supreme court of the State of California on the appeal from the judgment and from the order denying plaintiff's motion for a new trial.

W. H. H. HART,
Attorney General, Attorney for Plaintiff.
CRAIG & MEREDITH,
WILLIAM MATTHEWS,
Of Counsel for Plaintiff.
S. W. AND E. B. HOLLADAY AND
MASTICK, BELCHER & MASTICK,
Attorneys for Defendants.

572 *Certificate.*

(Title of Court and Cause.)

No. 10459. In Late 15th District Court.

I, M. C. Haley, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court in and for the said city and county, hereby certify, that I have compared the foregoing transcript with the original papers in the above-entitled action, now on file in my office and with all orders therein made and entered on the minutes of said court, and that the said papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof; and that the erasures and interlineations were made before certifying hereto.

In witness whereof, I have hereunto set my hand, and affixed the seal of said superior court, this — day of May, A. D. 1893.

M. C. HALEY, *Clerk*,
By —— ——,
Deputy Clerk.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript in cause # 15379, People, Bryant, *vs.* Samuel W. Holladay, as shown by the records of my office.

Witness my hand and the seal of the court, this 3rd day of January, A. D. 1895.

[Seal Supreme Court of California.]

L. H. BROWN, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

The chief justice of the supreme court of the State of California attests that the foregoing certificate is in due form.

January 3rd, 1895.

W. H. BEATTY,
Chief Justice.

573 In the Supreme Court of the State of California, Dep't Two.

THE PEOPLE *ex Rel.* BRYANT, Appellant, *vs.* SAMUEL W. HOLLADAY *et al.*, Respondents. } No. 15379. On Appeal from the Superior Court of the County of San Francisco.

The judgment and order appealed from are affirmed.

McFARLAND, *J.*

We concur:

DE HAVEN, *J.*
FITZGERALD, *J.*

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above-entitled cause on the 8th day of June, A. D. 1894, as shown by the records of my office.

Witness my hand and the seal of the court this 3rd day of January, A. D. 1895.

[Seal Supreme Court of California.]

L. H. BROWN, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

574 In Bank.

Filed January 28, 1886.

THE PEOPLE *ex Rel.* ANDREW J. BRYANT, Appellant,
v.
SAMUEL W. HOLLADAY *et al.*, Respondents. } No. 8501.

575 ROSS, *J.:*

This action was instituted at the relation of A. J. Bryant, by the attorney general of the State, in the name of the people, to cause the removal from a tract of land designated upon the map of the city and county of San Francisco as Lafayette park — certain buildings and fences maintained thereon by the defendants. The complaint alleges that the land in question was "heretofore, to wit, on the eleventh day of March, A. D. 1858, by the lawful owner and holder thereof lawfully dedicated to public use as a public square by the name of Lafayette park, and such dedication accepted by the public, and then was and still is laid down upon the official map of said city and county as a public square as aforesaid." It is also averred that the defendants maintain buildings and fences on the land which constitute a public nuisance.

In their answer the defendants admit the maintenance of the buildings and fences; deny that the land ever was dedicated to public use, or that it ever was a public park, and in addition set up in bar of the action the judgment given in a certain action commenced by the attorney general on the 16th of November, 1863, in the name of The People at the relation of George T. Bohen against the defendants and their predecessors in interest.

The complaint in that case averred that the said tract of land called Lafayette park had been theretofore dedicated and accepted by the public as a public square; that the defendants were erecting and maintaining fences and other improvements thereon, and asked that those erected be removed and defendants be enjoined from erecting or maintaining others. On the 27th of November, 1863, the defendants filed their answer in the action, in which they denied the alleged dedication and averred title in themselves to the premises. The issue thus joined was on the 21st of April, 1864, sub-

mitted to the late fourth district court for its decision, and
576 on the 11th day of July, 1864, that court rendered its judgment, by which it was adjudged that no such dedication as was alleged in the complaint was ever made, but that, on the contrary, the property in question was at the time of the commencement of that action and at the time of the trial thereof and judgment therein the private property of the defendant Holladay.

The question now before us is whether or not the judgment just referred to is a bar to the present action. It is urged on behalf of the people that this cannot be so because at the time the former action was commenced and at the time issue therein was joined the legal title to the land was in the Government of the United States and did not pass from it until the passage of the act of Congress of July 1, 1864, and then only in trust for the uses and purposes specified in the ordinances of the city and county of San Francisco which were ratified by the act of the legislature of date March 11, 1858.

There can be no doubt that to the extent just stated, at least, the counsel for the plaintiff are correct. "The nature of the title of San Francisco to her pueblo lands," said the Supreme Court of the United States in Palmer *v.* Low, 98 U. S., 16, "has often been the subject of consideration in this court and was carefully stated by Mr. Justice Field in Townsend *v.* Greeley, 5 Wall.,326, and Grisar *v.* McDowell, 6 Wall., 363. At the time of the conquest the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portions of those lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. 'It was a right which the Government might refuse to recognize in a qualified form' (6 Wall., 373). Upon the conquest the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo. As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed. Before, therefore, the estate of the pueblo could become absolute and indefeasible some action was required on the part of the United States. It is conceded that this action was not taken until the act of July
577 1, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee 'for the uses and purposes specified' in the Van Ness ordinance."

There are numerous decisions of this court to the same effect. The title which passed to the city and county of San Francisco by the act of Congress of July 1, 1864, was unaffected by the judgment pleaded in bar herein: First, because it was acquired long after issue in the action in which that judgment was rendered was joined and the cause submitted for decision, and was not put in issue therein (People's Savings Bank *v.* Hodgdon, 64 Cal., 95; Valentine *v.* Mahoney, 37 Cal., 396); and, secondly, because the attorney general of the State had no power to submit to the determination of any tribunal the title of the Government of the United States.

The title which the Government of the United States conveyed to the city of San Francisco by the act of Congress of July 1, 1864, was, as the act itself recites, conveyed for the uses and purposes specified in the ordinances of the city that were ratified by the act of the legislature of the State approved March 11, 1858. To hold the public squares of the city in trust for the use of the people was among those purposes. If the particular piece of land in controversy had been prior to the passage of the act of Congress of July 1, 1864, dedicated by the city as a public square, Congress, "granting and relinquishing the title of the United States to the city for the uses and purposes mentioned in the act of March 11, 1858, ratified and confirmed the dedication and made it operative upon the legal title, as well as such title as the city held prior to the act of July 1, 1864, and this virtually perfected the dedication" (Hoadley *v.* San Francisco, 50 Cal., 274). To hold that the plaintiffs are concluded by the judgment pleaded in bar from showing that there was a dedication to which the title conveyed by the act of 1864 related and which it perfected would be in effect to hold the title conveyed by the act of 1864 concluded by the former judgment, which, for the reasons already given, is not the case.

Our conclusion is that the judgment of the court below, holding the plaintiffs estopped by the judgment given in the action
578 commenced in 1863, is erroneous.

Judgment and order reversed and cause remanded for a new trial.

McKee, J.; Morrison, C. J.; Thornton, J.; McKinstry, J., and Sharpstein, J., concurred.

Rehearing denied.

579 In the Supreme Court of the State of California.

THE PEOPLE, ETC., *vs.* S. W. HOLLADAY *et al.* } No. 8501. On Appeal from the Superior Court of the County of San Francisco.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed Jan'y 28, 1886, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 12 day of March, A. D. 1895.

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

580 [Endorsed:] No. 8501. In the supreme court, State of California. The People *vs.* S. W. Holladay *et al.* Certified copy of opinion. Filed —— —, ——. —— ——, clerk, by —— ——, deputy.

581 In Bank.

THE PEOPLE *ex Rel.* A. J. BRYANT, Respondent, *vs.* S. W. HOLLADAY *et al.*, Appellants. } No. 13676. Filed Feb. 4, 1892.

DE HAVEN, *J.:*

This is an action brought by the attorney general, in behalf of the people of the State, upon the relation of one Bryant. It is alleged in the complaint that the land therein described was lawfully dedicated to public use as a public square on March 11, 1858, by the name of Lafayette park, and that defendants have erected buildings and fences thereon, thereby obstructing the public in the use of the same as a square, and judgment is asked to the effect that such buildings and fences constitute a nuisance and that defendants be enjoined from maintaining or continuing the same or from otherwise obstructing the people of the State in the free use of said land for the purpose for which it was dedicated. In their answer defendants deny that the land described in the complaint was ever dedicated to public use as a square, and also allege that on November 16th, 1863, the plaintiff therein, upon the relation of one Bohen, commenced an action against S. W. Holladay, one of the defendants herein, and through whom the other defendants claim; that in said action the same identical matters alleged in this complaint were in issue and judgment therein was finally rendered against this plaintiff and in favor of defendant Holladay — is also particularly averred as a separate defense that in said action one of the material issues was whether the land here in controversy was ever dedicated to the public as a square, and that this issue was found and adjudged against plaintiff. The answer further alleges, as a separate defense, that on December 17th, 1864, the defendant S. W. Holladay commenced an action against the city and county of San Francisco to quiet his title as against all adverse claims of said city and county to the land in controversy, and that judgment was therein given to the effect that said Holladay was the owner of an undivided nineteen-twentieths of said land, and his title thereto was quieted as against the said city and county, and in this connection it is
582 further alleged that one of the material issues tried in that action and determined adversely to the present claims of the plaintiff herein was whether the land in controversy had ever been dedicated to the public use as a square and whether said city and county held the legal title hereto in trust for the people of the State. The present action was tried by the court without a jury and findings filed to the effect that the matters alleged in the answer of the defendants were true and judgment was hereafter entered for the defendants. Subsequently the court granted plaintiff's motion for a new trial, and from this order the defendants appealed.

The land in controversy is within the corporate limits of the city of San Francisco as defined by the act of the legislature of this State of April 15, 1851 (Stats. 1851, p. 157), and all the right and title of

the United States thereto were, by section 5 of the act of Congress of July 1, 1864, to expedite the settlement of titles to lands in the State of California (13 U. S. Stats. at Large, 332), "relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinance of said city ratified by an act of the legislature of the said State approved on the 11th of March, 1858." It is conceded that this land forms a part of the tract designated as Lafayette park upon the map, showing the location of streets and public squares in the city of San Francisco, the map approved by one of the ordinances of said city, ratified by the act of the legislature of this State approved March 11, 1858 (Stats. 1858, p. 52), and referred to in the act of Congress of July 1, 1864. It further appears from the evidence that the defendants and their successors in interest were in the actual possession of the land on January 1, 1855, and so continued until after March 11, 1858.

1. It has been repeatedly held by this court that the act of the legislature of March 11, 1858, ratifying and confirming the ordinance referred to operated as a selection and dedication to public use of the tracts marked as public squares on the map approved by that ordinance, and that the above-mentioned act of Congress of
583 July 1, 1864, had the effect to confirm such dedication and make it operative upon the legal title as well as upon such title as the city held prior thereto (Hoadley *v.* San Francisco, 50 Cal., 263; Sawyer *v.* San Francisco, 50 Cal., 370; Hoadley *v.* San Francisco, 70 Cal., 320). This being so, it follows that the land in controversy was in fact dedicated to the public, as alleged in the complaint, and, as a consequence, defendants never acquired any title thereto by virtue of the possession of themselves or predecessors and the act of the legislature of this State of March 11, 1858, or the ordinances thereby ratified. The plaintiff is, therefore, entitled to maintain this action unless estopped by one or the other of the judgments relied upon by defendants as a bar.

2. It was held by this court upon the former appeal in this case that the judgment rendered in favor of defendant Holladay in the action brought by the people of the State upon relation of Bohen is not a bar to the present one. In discussing this question the court said: "The title which passed to the city and county of San Francisco by the act of Congress of July 1, 1864, was unaffected by the judgment pleaded in bar herein, first, because it was acquired long after issue in the action in which that judgment was rendered was joined and the cause submitted for decision, and was not put in issue therein (People's Savings Bank *v.* Hodgdon, 64 Cal., 65; Valentine *v.* Mahoney, 37 Cal., 396), and, secondly, because the attorney general of the State had no power to submit to the determination of any tribunal the title of the Government of the United States" (People *v.* Holliday, 68 Cal., 439). This record does not disclose any additional facts in relation to the judgment the effect of which was thus passed upon, and the decision upon the former appeal must therefore be deemed the law of the case so far as concerns the particular point therein decided.

The finding of the court below that the people of the State have

acquired no new or different title to the land in controversy since the commencement of the former action, relied upon as a bar, is not sufficient to take the question now under consideration out of the operation of the law declared on the former appeal, first, be-
584 cause the finding itself was set aside by the order granting a new trial, and, secondly, because it was only a conclusion of law which that court drew from the same facts which were before this court on the former appeal. Nor can the appellants avoid the force of that decision by the special and particular manner in which they have alleged that respondents are estopped to retry in this action the question of dedication which was in issue and passed upon in the former action. The fact of dedication is essential to support respondents' cause of action, and that they are estopped by the judgment relied upon by appellants as an estoppel from showing such fact is not only the necessary and logical effect of the decision of this court upon the former appeal, but was so stated by the court in the following language: "To hold that the plaintiffs are concluded by the judgment pleaded in bar from showing that there was a dedication to which the title conveyed by the act of 1864 related and which it perfected would be in effect to hold the title conveyed by the act of 1864 concluded by the former judgment, which, for the reasons already given, is not the case." As already stated, this decision constitutes the law of this case, and we hold, in accordance with it, that the former judgment in the action brought against defendant Holladay by the present plaintiff upon the relation of Bohen does not constitute a bar to this action or conclude the question of dedication involved here.

3. This brings us to consider the effect of the judgment in the case of Holladay *v.* City and County of San Francisco, commenced December 17, 1864, and after the legal title to the land in controversy had passed from the United States by the act of Congress of July 1, 1864. That was an action to quiet title, and it appears from the evidence that the question therein litigated was whether the land in controversy had ever been dedicated to the public use claimed by the people in this action. It is contended by the respondents that such matter was not in issue in that case, the answer of the defendant simply denying all of the allegations of the complaint in that action; but this court held in the late case of
585 San Francisco *v.* Holladay, 76 Cal., 18, in relation to this particular judgment, that this question was involved therein, and that such judgment was a bar to any further assertion by the city and county of San Francisco that it held the legal title in trust for the people. The court then said: "It is claimed by appellants that the record in that case is not binding upon the city or the people, for the reason that at the date of the institution of the suit all the title that the city had was the bare right to the possession of this land in trust for the people of the State; but the particular matter litigated in that suit was whether the city held the fee in trust for the people or at all, and it was adjudged therein that the city had no right, title, or interest in the land. The judgment in that case was not appealed from and is final so far as the city is

concerned. It quieted the title of the plaintiff as against any and all claims of defendant therein." (San Francisco *v.* Holladay, 76 Cal., 18.)

The pleadings in that case being sufficient to put in issue the question of dedication involved herein, what is the effect of such judgment upon the rights of the present plaintiff? Are the people of the State thereby estopped from asserting that the defendant in that action, The City and County of San Francisco, did hold and now holds the legal title to the land in controversy in trust for the use of the people of the State as a public square?

The city and county of San Francisco is a municipal corporation created by the legislature of the State and has conferred upon it by the State full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or lands claimed by it to have been dedicated to it for such purposes, and in any action brought by it for the use of vindicating and protecting the public rights in such squares or land claimed as such the State would be bound by the result, because in such action the city and county would, in fact, represent the people of the State by virtue of the authority given it to maintain such actions for the purpose of
586 preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the State organized for the more convenient administration of certain powers belonging to the State (Sinton *v.* Ashbury, 41 Cal., 531; Barnes *v.* District of Columbia, 91 U. S., 544; Board of Education *v.* Martin, 92 Cal., 209), and such corporations, in their management and control over streets and squares within their limits and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the State. Accordingly it has been held that a city has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the State. Thus in the case of Metropolitan City R'y Co. *v.* Chicago, 96 Ill., 628, it is said: "The State has a like control over highways, streets, and public grounds as is exercised by the Crown of England, and may have like remedies against persons unlawfully obstructing the same. A portion of the political power of the State is committed to the municipalities. The General Assembly of this State has vested in cities, villages, and towns the right to control the use of highways, streets, and public grounds within their respective limits, and they are invested with the authority of the Crown and of the State in this respect to file bills to prevent and remove obstructions from the streets, highways, and public grounds under their control." So, also, in Trustees *v.* Cohen, 4 Paige, 510, 27 Am. Dec., 80, it was held that the municipality so far represents the equitable rights of its inhabitants that it is authorized to maintain an action to abate a public nuisance upon a public square; and to the same effect is the case of City of Demopolis *v.* Webb, 87 Ala., 659.

There are other cases which seem to base the right of municipal corporations to maintain such actions upon the narrower ground

that they suffer special and peculiar injury in the obstruction of streets and squares different from that sustained by the general public, but we are satisfied with the broader rule announced in the above-cited cases.

We entertain no doubt that the city and county of San
587 Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares or land claimed as such within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the State itself is bound by the result of such litigation, if the same is not collusive, and we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant, as, for instance, ejectment, where it had ousted the claimant from the possession, or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from the land claimed by it as a public square, and the public would be bound by the final judgment therein if the action was conducted in good faith on the part of the city. The rule that the citizen shall not be twice vexed for the same cause of action is as binding upon the State as upon other litigants, and the legislature, in conferring upon the city power to maintain and defend in the courts the rights of the State to streets and squares within its limits, must be presumed to have done so with reference to this well-known maxim and to have intended that the State should be bound by the result of such litigation; and that an action by the adverse claimant against the city to quiet his title, where the city claims to hold the legal title in trust for the use of the people as a public square, is an appropriate action to determine such claim is the effect of the decisions of this court in San Francisco *v.* Holladay, 76 Cal., 18, and San Francisco *v.* Itsell, 80 Cal., 57.

In San Francisco *v.* Holladay, 76 Cal., 18, the action was ejectment by the city and county of San Francisco for the purpose of recovering the land in controversy in this action, the plaintiff claiming that it held the legal title to the land in trust for the people of the State, and that the same had been dedicated to the use of the public, and that the defendants were intruders thereon. The action was therefore substantially one for the use and benefit of the people of the State, and as the plaintiff therein was authorized by law to bring the action for the purpose of preserving the
588 alleged rights of the people it could only be defeated by showing that the people of the State were not entitled to maintain such action, and the court, in holding that the right of the city and county of San Francisco to recover possession of the land in controversy for the use of the general public was barred by the judgment in Holladay *v.* City and County of San Francisco, which is pleaded in bar of this action, in effect decided that the rights of the people of the State were also barred by that judgment.

There is nothing decided in the case of Branham *v.* Mayor, etc., of San José, 24 Cal., 585, in conflict with the conclusion we have reached on this point. All that there was decided was that a decree

foreclosing a mortgage and the execution of a sheriff's deed under the decree transferred to the purchaser the interest which the mortgage created and vested in the mortgagee, and nothing more. In that case the city of San José executed a mortgage upon certain lands, which mortgage was void because of want of power in the city to execute the same or to alienate the land, and it was held that the subsequent foreclosure of this mortgage, in an action to which the city was a party, gave to the mortgage no additional validity, and that the city was not stopped by the decree of foreclosure from asserting the invalidity of the title attempted to be conveyed by the sheriff's deed thereunder. This was only the assertion of a very familiar rule as to the estate or title upon which a decree of foreclosure operates, but manifestly can have no relation to the question we have been considering, which is whether the State, by authorizing the city and county of San Francisco to sue and defend actions for the purpose of preserving and protecting the right of the general public in land claimed to have been dedicated as a public square, is bound equally with the municipality by the result of such litigation.

4. The judgment in Holladay *v.* City and County of San Francisco, and which we hold to be equally binding upon the State as upon the city of San Francisco, was undoubtedly erroneous
589 under the law as declared by this court, subsequently, in the cases of Sawyer *v.* San Francisco, 50 Cal., 370, and Hoadley *v.* San Francisco, 70 Cal., 324, but its force as an adjudication of the rights of the parties thereto and those in privity with them is not affected thereby. (Carr *v.* Beauregard, 101 U. S., 688.)

To say that the bar of an estoppel by judgment can be removed by showing that it ought not to have been rendered would be in effect to declare that no fact is to be deemed as finally set at rest by a judgment, and that litigation upon the same matter may be interminable. But by the judgment in Holladay *v.* City and County of San Francisco it was determined that the defendants here own an undivided nineteen-twentieths of the land in controversy, and the finding of the court below that all the land in controversy is the private property of the defendants, free and clear from any and all dedication whatever (and we construe the first conclusion of law as a finding of fact), was not justified by that judgment or by the other evidence in the case, and because of this error in the findings the court did not err in granting plaintiff's motion for a new trial. Although the effect of the judgment in the case just referred to is a bar to the right of the plaintiffs to the relief demanded in this action, they are still entitled to a correct finding as to the extent of the interest owned by defendants in the land in controversy. Upon the evidence disclosed in this record, the finding as to this fact should have been in accordance with the terms of the judgment in Holladay *v.* City and County of San Francisco, as above stated.

Order affirmed.

Garoutte, J.; McFarland, J.; Sharpstein, J., and Beatty, C. J., concurred.

Harrison, J., being disqualified, did not participate in the foregoing opinion.

590 In the Supreme Court of the State of ... the obstruction of ... d by the general

THE PEOPLE, ETC., } No. 13676. On Appeal ... nounced in the
vs. } ... rior Court of the County o...
S. W. HOLLADAY *et al.* } ...cisco. ... of San

I, T. H. Ward, clerk of the supreme court of the State of Ca... the fornia, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed Feb. 4, 1892, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 12 day of Feb'y, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WOOD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

591 [Endorsed:] No 13676. In the supreme court. State of California. The People, etc., *vs.* S. W. Holladay *et al.* Certified copy of opinion. Filed —— —. —— ——, clerk, by —— ——, deputy.

592 Department Two.

Filed June 8, 1894.

THE PEOPLE, ETC., Appellant, } No. 15379.
vs.
S. W. HOLLADAY *et al.*, Respondents. }

This is an appeal by plaintiff from a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial.

The litigation is about the ownership of a piece of land in the city of San Francisco which respondents claim to own and which, according to appellant's contention, was dedicated to public use as a park. The litigation has been in progress under various forms for over thirty years, and has generally resulted favorably to respondents herein. This present case was here before on an appeal by the present respondents, and the decision on that appeal is to be found in 93 Cal., 243; 27 Am. St. Rep., 186. By that decision it was definitely determined, and it has become the law of the case, that the present respondents are the owners of the undivided nineteen-twentieths of the land in contest, but an order of the lower court granting a new trial was affirmed because the judgment erroneously included the other twentieth, which was not involved in the action. When the remittitur went down the defendants (respondents herein) filed a supplemental answer, which put the said one-twentieth in the same category with the other nineteen-twentieths, so that the said decision on the former appeal applied to the whole of the property. On the present appeal there are no new points made which require notice. In the opinion of the court on the former appeal, delivered by Mr. Justice De Haven, the points upon

which the case turns were fully discussed, and it would be useless to restate here the views there expressed. For the reasons given in that opinion the judgment and order must be affirmed.

593 The judgment and order appealed from are affirmed.

McFARLAND, *J.*

We concur:
DE HAVEN, *J.*
FITZGERALD, *J.*

594 In the Supreme Court of the State of California.

THE PEOPLE, ETC., *vs.* HOLLADAY *et al.* } No. 15379. On Appeal from the Superior Court of the County of San Francisco.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed June 8, 1894, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 12 day of March, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

595 [Endorsed:] Copy. No. 15379. In the supreme court, State of California. The People, etc., *vs.* Holladay *et al.* Certified copy of opinion. Filed ——, —. —— ——, clerk, by —— ——, deputy.

596 UNITED STATES OF AMERICA, *ss*:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, plaintiffs and appellants, and S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, defendants and respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or

wherein was drawn in question the construction of a clause
597 of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

598 Let this be filed.

BEATTY, *C. J.*

[Endorsed:] 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Writ of error. Filed Feb. 5, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

599 *Marshal's Return.*

STATE OF CALIFORNIA, } ss:
Northern District of California, }

J. A. Littlefield, being duly sworn, says that he is now and at all the times hereinafter mentioned was a deputy marshal of the United States for the northern district of California; that on the 6th day of February, 1895, affiant received the original citation a true copy of which is annexed hereto and made a part hereof; that thereupon, on the 6th day of February, 1895, he personally served the said citation on Mary W. Mastick, executrix of the will of S. L. Mastick, deceased, by delivering to her personally at the city of Alameda, county of Alameda, in the State of California, in the northern district of California, a copy of the said citation.

J. A. LITTLEFIELD.

Subscribed and sworn to before me this 7th day of March, 1895.

W. J. COSTIGAN,
Commissioner U. S. Circuit Court,
Northern District of California.

600 UNITED STATES OF AMERICA, *ss:*

To S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The People of the State of California are plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

601 UNITED STATES OF AMERICA, *ss:*

To S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The People of the State of California are plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

602 *Marshal's Return.*

UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

T. J. Gallagher, being duly sworn, says that he is now and at all the times hereinafter mentioned was a deputy marshal of the United

States for the northern district of California; that on the sixth day of February, 1895, he received the original citation, of which the annexed is a true copy; that thereupon he personally served the said citation on Georgia C. O. Holladay and S. W. Holladay in person and as attorney for said Georgia C. O. Holladay and R. G. Davisson, and on W. C. Belcher, as attorney for said Mary W. Mastick, executrix of the will of S. L. Mastick, deceased, and also as attorney for R. G. Davisson. The said service was made in the manner following: By delivering a copy of said original citation on the 6th day of February, 1895, to said Georgia C. O. Holladay; on the 8th day of February, 1895, a like copy to S. W. Holladay in person for himself, and one to him as attorney for Georgia C. O. Holladay; on the 8th day of February, 1895, to W. C. Belcher, attorney for Mary W. Mastick, executrix of the will of S. L. Mastick, deceased; on the 27th day of February, 1895, to W. C. Belcher, as attorney for R. G. Davisson; on the last-mentioned day to S. W. Holladay, as attorney for R. G. Davisson. All of the said services were made in the city and county of San Francisco, in the State of California and in the northern district of California; that on the 20th day of February, 1895, the affiant delivered the said original citation, together with an unsigned draft of a return showing what he had then done, to J. H. Meredith, one of the counsel in the cause, and since said time the affiant has not seen or had in his possession the said original citation, and he has no knowledge as to where it is; that after diligent search he has been unable to find the said R. G. Davisson within said district.

T. J. GALLAGHER.

Subscribed and sworn to before me this 7th day of March, 1895.

W. J. COSTIGAN,
Commissioner U. S. Circuit Court,
Northern District of California.

603 [Endorsed:] 15379. Supreme court of the State of California. People of State of California *vs.* S. W. Holladay. Proof of service of citation.

604 In the Supreme Court of the United States of America.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in Error,
vs.
S. W. HOLLADAY *et al.*, Defendants in Error.

STATE OF CALIFORNIA, *ss:*

J. H. Meredith, being duly sworn, deposes and says—

That he is and was at the times hereinafter mentioned one of the counsel for The People of the State of California, the plaintiffs in error.

That on the 20th day of February, 1895, at the city and county of San Francisco, in the State of California, —— Gallagher, a dep-

uty marshall of the United States for the northern district of California, delivered to the affiant, at his office, the original citation in the above-entitled cause, together with the written return of the said marshall showing the proceedings of the said marshall in serving the said citation; that a true copy of the said citation is annexed to this affidavit and made a part thereof; that the said citation and the said written return were by affiant placed upon a table in his office, where affiant is accustomed to place papers awaiting
605 his examination; that within two or three hours thereafter the affiant left his office, leaving the said papers on his table as aforesaid, and went out of the city and county of San Francisco, and was absent therefrom for six days.

That on his return he personally made a thorough search among the papers upon his table and everywhere else in his office and made diligent inquiry and search for said papers, and he has been unable to find the same.

J. H. MEREDITH.

Subscribed and sworn to before me this seventh day of March, A. D. 1895.

W. J. COSTIGAN,
Commissioner U. S. Circuit Court,
Northern District of California.

606 UNITED STATES OF AMERICA, *ss:*

To S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The People of the State of California are plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

607 [Endorsed:] No. 15379. Supreme court of California. People of State of California *vs.* S. W. Holladay *et al.* Proof of service of citation. Filed Mar. 8, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

608 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, plaintiffs and appellants, and S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, defendants and respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may
609 cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

WM. M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Writ of error. Filed Feb. 5, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

610 [Endorsed:] 15379. The People, etc., *vs.* S. W. Holladay *et al.* Copy. Writ of error. Lodged in the office of the clerk of the supreme court of California for the defendant R. G. Davisson Feb. 12, 1895. W. F. Fitzgerald, att'y general. Craig & Meredith, William Matthews, of counsel for plaintiff in error.

611 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, plaintiffs and appellants, and S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, defendants and respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commi*t*tion, a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may
612 cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
WM. M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Writ of error. Filed Feb. 5, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

613 [Endorsed:] 15379. The People, etc., *vs.* S. W. Holladay *et al.* Copy. Writ of error. Lodged in the office of the clerk of the supreme court of California for the defendant Georgia C. O. Holladay Feb. 12, 1895. W. F. Fitzgerald, att'y general. Craig & Meredith, William Matthews, of counsel for plaintiffs in error.

614 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, plaintiffs and appellants, and S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, defendants and respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
615 further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
WM. M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Writ of error. Filed Feb. 5, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

616 [Endorsed:] 15379. The People, etc., *vs.* S. W. Holladay *et al.* Copy. Writ of error. Lodged in the office of the clerk of the supreme court of California for the defendant S. W. Holladay Feb. 12, 1895. W. F. Fitzgerald, att'y general. Craig & Meredith, William Matthews, of counsel for plaintiffs in error.

617 UNITED STATES OF AMERICA, *ss:*

[SEAL] The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, plaintiffs and appellants, and S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, defendants and respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs and appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington,

within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
618 further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
WM. M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Writ of error. Filed Feb. 5, 1895. T. H. Ward, clerk, by R. A. Marshall, deputy.

619 [Endorsed:] 15379. The People, etc., *vs.* S. W. Holladay *et al.* Copy. Writ of error. Lodged in the office of the clerk of the supreme court of California for the defendant Mary W. Mastick, as exec. of S. L. Mastick, deceased. W. F. Fitzgerald, att'y general. Craig & Meredith, William Matthews, of counsel for plaintiffs in error. Feb. 12, 1895.

620 Filed Mar. 12, 1895.

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in Error, *vs.* S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, R. S. Davisson, Mary W. Mastick, Executrix of S. L. Mastick, Deceased, Defendants in Error.	No. 15379. On Writ of Error to the Supreme Court of the United States.

Assignments of Error.

Now come the plaintiffs in error aforesaid, and make their assignments in error, in manner following:

The supreme court of California, having first declared that the land in controversy, was in fact dedicated to the public as alleged in the complaint, it was error then to overrule the objections in-
621 terposed by the plaintiffs to each of the judgments, in the cases of S. W. Holladay *vs.* The City and County of San Francisco, and The City and County of San Francisco *vs.* S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased and R. G. Davisson.

Said objections interposed to each of said judgments, when the same were brought forward in the said supreme court, were as follows:

"First. Because the plaintiffs are strangers to the record in which the judgment was given—were never served with process therein and never authorized the submission of the rights of the plaintiffs to adjudication in said action.

"Second. That to hold the said judgment to be a defense in this action would be to deprive the people of the rights in the land in controversy, granted to them by the act of Congress approved July 1st, 1864, entitled 'An act to expedite the settlement of titles to lands in the State of California,' and derived by them under the act of Congress, approved March 8th, 1866, entitled 'An act to acquire title to certain lands within the corporate limits of the city of San Francisco;' and under an act of Congress, approved July 23rd, 1866, entitled 'An act to quiet land titles in California;' and under an act of Congress, approved March 3rd, 1851, entitled 'An act to ascertain and settle private land claims in the State of California,'
622 and under the acts of Congress amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights, secured by the Constitution of the United States, and especially by the 5th and 14th amendments thereof."

It was likewise error to decide, that the said right of the public to said land derived under the United States was set aside by the said judgments in Holladay *vs.* San Francisco, and San Francisco *vs.* Holladay, and that the plaintiffs were estopped, by said judgments, from claiming, that said land is a part of their public park, and that their suit should be dismissed.

Wherefore, the plaintiffs in error pray that the judgment in this action of the supreme court of California be reversed, and that judgment be ordered in their favor in accordance with the prayer of their complaint.

W. F. FITZGERALD,
Attorney General.
CRAIG & MEREDITH,
WILLIAM MATTHEWS,
Of Counsel.

623 UNITED STATES OF AMERICA, *ss:*

To S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, and R. G. Davisson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The People of the State of California are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

624 [Endorsed:] 15379. Supreme court of the State of California. People of the State of California *v.* S. W. Holladay *et al.* Copy. Citation. Feb. 12, 1895. Lodged in the office of the clerk of the supreme court of California for the defendant R. G. Davisson. W. F. Fitzgerald, att'y general. Craig & Meredith & William Matthews, of counsel.

625 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in Error,
vs.
S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, R. S. DAVISSON, Mary W. Mastick, Executrix of S. L. Mastick, Deceased, Defendants in Error.

Certificate of Clerk.

In obedience to the mandate of writ of error from the Supreme Court of the United States, attested on the 21st day of January, A. D. 1895, I herewith return a true copy of the record in the case numbered 15379, entitled The People of the State of California *ex rel.* A. J. Bryant *vs.* S. W. Holladay, Georgia C. O. Holladay, R. S. Davisson, Mary W. Mastick, executrix of S. L. Mastick, deceased, including therewith certified copies of three (3) opinions of the *the* supreme court of the State of California given in said cause.

I return likewise the original writ of error, copy of citation lodged in this office, the proof of service of the citation filed in this office, and four (4) copies of the writ of error lodged therein, and likewise the assignments of error filed by the plaintiffs in this case.

In witness whereof I have hereunto attached my hand and affixed the seal of the supreme court of the State of California this 12th day of March, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By R. A. MARSHALL, *Deputy.*

Endorsed on cover: Case No. 15,839. California supreme court. Term No., 566. The People of the State of California, plaintiffs in error, *vs.* S. W. Holladay, Georgia C. O. Holladay, Mary W. Mastick, executrix of S. L. Mastick, deceased, & R. G. Davisson. Filed March 21, 1895.

FILED
OCT 9 1895
JAMES H. McKENNEY,
CLERK.

Defendants' Notice and Brief on their Motion to Dismiss for want of Jurisdiction

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1895.

No. 566.

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFFS IN ERROR,

vs.

S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, MARY W. MASTICK, EXECUTRIX OF S. L. MASTICK, DECEASED, AND R. G. DAVISSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 1895.

(15,839.)

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA by JO. HAMILTON, Attorney General, at the Relation of Andrew J. Bryant,

Plaintiffs in Error,

vs.

SAMUEL W. HOLLADAY, GEORGIA C. O. HOLLADAY, AND MARY W. MASTICK, Executrix of the last Will of S. L. MASTICK, Deceased, AND R. G. DAVISSON,

Defendants in Error.

No. 566, October term of 1895

Notice of Motion to Dismiss.

The plaintiffs in error in the above entitled cause will please take notice, that at the opening of the Supreme Court of the United States in Washington, D. C., on Monday morning, November 4th, 1895, or as soon thereafter as the matter can be heard, the defendants in error will move said Court to dismiss the pending writ of error in said cause, on the ground that the Court has not jurisdiction in the premises, there being no federal question in the record. With said motion will be used and submitted the following printed brief served on you herewith.

Respectfully,

S. W. HOLLADAY,

Atty. for Defendants in Error.

San Francisco, September 26, 1895.

In the Supreme Court of the United States,

THE PEOPLE OF THE STATE OF CALIFORNIA ex Rel. A. J. BRYANT,
Plaintiffs in Error,

vs.

S. W. HOLLADAY ET AL.,
Defendants in Error.

No. 566.
October Term, 1895.

Defendants' Brief on Their Motion to Dismiss for Want of Jurisdiction.

This is a motion by S. W. Holladay et al., defendants, to dismiss the writ of error herein, on the ground that the record presents no federal question, and therefore that this Court has no jurisdiction.

In the trial Court defendants recovered judgment, which, on appeal, was affirmed by the Supreme Court of California.

Plaintiffs sued out the present writ of error, which defendants now move to dismiss.

The subject matter of this action is land (amounting in the aggregate to six fifty-vara lots) in the City of San Francisco, State of California.

Defendants are in possession, claiming the same in fee simple absolute, which possession, with claim of title, has continued for above forty years last past.

The complaint alleges that a certain piece of land (describing a tract four blocks in extent, including the part thereof here in dispute) "was heretofore, to wit, on the eleventh day of March, A. D. 1858, by the lawful owner and proprietor thereof, lawfully dedicated to public use as a public square, by the name of 'Lafayette Park,' and such dedication accepted by the public, and then was and still is laid down upon the official map of said city and county as a public square as aforesaid."

That the defendants have erected fences within said public square, which enclose and are the means of excluding plaintiffs from a certain piece or parcel of said public square (describing the land in dispute), and that defendants have erected and maintained a dwelling house and other permanent improvements within and upon the premises, which

interfere with and hinder the use by the public of said public square, and which are accordingly public nuisances, and the prayer is that they be abated, etc.

Defendants answered. They denied that the land ever was dedicated; admitted their occupation of the six fifty-vara lots in dispute, and their intention to keep out the public; and as special defenses they pleaded three judgments in bar and estoppel. One of the judgments so pleaded runs against the People of the State of California, and two of them run against the City and County of San Francisco.

The actions in which those judgments were made, in each instance involved the same land and the same question of dedication as here in dispute; and the prevailing parties, were these defendants or their predecessor in interest, S. W. Holladay.

The trial Court decided herein that each of the two judgments against the City and County of San Francisco is, as a plea, a bar, and as evidence conclusive against the claim of dedication made by the plaintiffs in the present action; and that the Court is thereby precluded from again inquiring into the question or claim of dedication made by the plaintiffs in this action. (Original paging 187). That decision was affirmed by the Supreme Court of the State.

Such is the general outline of this case. The decision however does not determine or reach the merits of the cause of action set out in the complaint, *i.e.* whether or not the land was dedicated to public use. The only point decided is that plaintiffs are barred and estopped by two certain judgments, from again setting up or litigating said claim of dedication.

Upon the trial, the evidence adduced by plaintiffs (original paging 193-235) showed that their claim of dedication arose out of certain ordinances of the City of San Francisco known as the "Van Ness Ordinance," as ratified by the State Statute of March 11, 1858. (Trans. P. 208).

The Van Ness Ordinance was dated June 20, 1855, and was in terms a present grant by the city of all its right and claim to the lands within the corporate limits, to the parties in the actual possession thereof on the 1st of January, 1855 (Page 209, Sec. 2). But the Ordinance provided a way by which the city might lay out public parks upon the lands granted, and thus reclaim the title to such parcels (Page 212, Sec. 6).

After the passage of the Ordinance, certain steps were taken by the city, ending in the making of a map, upon which this land appears marked as a park. The Van Ness Ordinance, a subsequent ordinance, and an order adopting the map were all ratified together by the Legislature in the Statute of March 11, 1858.

The plaintiffs upon the trial introduced the ordinances, order, map, and statute aforesaid, as tending to prove that the land had been dedicated by the city ordinances, as ratified by the statute of the date above mentioned; and to support the averment that such dedication was "by the lawful owner and proprietor thereof," *i. e.* the City of San Francisco, plaintiffs put in evidence the history—judicial and legislative—of San Francisco's pueblo title, showing that the city had

asserted her claim to pueblo lands before the United States Land Commission, and that the litigation finally ended in the decree of confirmation of the Circuit Court in 1865, confirming said claim of pueblo title. (P. 205.)

This part of plaintiffs' evidence was intended to prove that the City of San Francisco *was* the lawful owner at the time of the alleged dedication (in 1858), as averred in the complaint; while the city ordinances and map and the State Statute, were offered to prove that the land was dedicated to public use in 1858, as they had alleged.

The introduction of that evidence by plaintiffs, indicates what they relied upon as constituting the dedication of this land, and shows that they sought to have it adjudged that said matters constituted a dedication.

But the nature of the defense herein (bar and estoppel) prevented the Court from adjudging at all upon the merits of the plaintiffs' contention.

For defendants then put in evidence their judgments, showing that this very claim of dedication was *res judicata;* and, as to that claim, the plaintiffs are estopped, and this action is barred.

Second Defense Pleaded.

Our answer reads thus: (Page 87–8.)

And for further and separate defense these defendants allege that the plaintiffs ought not to have or maintain this action, because this same matter and all the matters in controversy herein, have been before the commencement of this action fully litigated and finally determined in favor of the defendant, S. W. Holladay, and against the plaintiffs, in that certain action commenced in the 4th District Court of California, on the 17th of December, 1864, by the defendant, S. W. Holladay, as plaintiff, against the City and County of San Francisco, a municipal corporation.

That in said action said City and County filed its answer to said complaint, and put in issue its title to the lands herein described, and that such proceedings were had, that on Sept. 25, 1867, the said Court by its judgment decreed that plaintiff in said action was the owner in fee simple absolute of an undivided 19/20 of the land, as to which his title was quieted as against the City and County of San Francisco.

That said judgment still remains a final and valid judgment in the premises between the parties and their successors in interest.

Third Defense Pleaded.

And these defendants, answering, further allege (page 134–5) that plaintiffs ought to be and are in law barred and estopped from the further prosecution of this action, because the City and County of San Francisco as plaintiff, on October 23, 1883, brought an action against these defendants in the Superior Court of said City and County, and alleged that said City and County was, on July 10, 1878, and still continued to be, seized in fee of the lands in dispute in the present action in

trust for the use of the State of California as a public park, and for the use of the people of the City and County of San Francisco as a public common or square, and that said plaintiff was entitled to possession of the same, and that said land was, on July 10, 1878, and at the time of filing said complaint, a public park or square, dedicated as such to the people of the State of California and of the City and County of San Francisco; and that these defendants had, on July 10, 1878, wrongfully entered upon said land and ejected plaintiff therefrom; and that defendants were still wrongfully withholding the possession thereof from said plaintiff; and prayed judgment against these defendants for the restitution of the premises, and for the value of the use and occupation thereof; that afterwards the defendants therein (who are defendants herein) duly appeared and filed their answer, wherein they denied each and all the allegations of said complaint; and further, said defendants pleaded various matters in bar and estoppel of the cause of action therein alleged, and averred that all the matters in issue therein were *res judicatæ*, and further alleged title and possession in defendants. (Page 136.)

That thereafter the said cause came on and was tried, and the Court duly gave and made its decision in writing on all the issues therein in favor of defendants and against plaintiff, which was filed; and that afterwards judgment was duly entered therein on July 25th, 1885, whereby it was ordered, adjudged and decreed that the City and County of San Francisco, plaintiff therein, take nothing by said action as against defendants named, (being the same defendants as herein,) but that judgment be and the same was entered therein in favor of said defendants and for their costs. That said judgment has become and is a valid and final judgment. (P. 137.)

And these defendants in their answer in the present suit further allege, that the land in controversy in said action, as described in the complaint therein, is the same land in controversy herein. (P. 138.)

And these defendants allege that plaintiffs herein ought to be barred and estopped from the further prosecution of this suit; and they pray judgment accordingly. (P. 139.)

This present cause was tried and disposed of upon the foregoing clear-cut issue of bar and estoppel:

The findings of the trial Court herein are full and explicit in our favor upon the issue of bar and estoppel.

The findings of fact herein appear, beginning on page 140 (original paging) and run to page 187. The conclusions of law herein are on pages 187 to 190.

The findings of fact herein touching the second defense pleaded (*i. e.* the suit S. W. Holladay *vs.* the City and County of San Francisco) begin with finding X (on page 146) extending to and including finding XIX (on page 173).

Such findings show that Holladay commenced an action against the City and County of San Francisco on Dec. 17th, 1864, to quiet his title to this very land. That summons was duly served, and the City answered, pleading the general issue. That the case was tried on its

merits, and that the Court made its decision in writing therein, which decision is set out in full in finding XII herein. (Pages 148–169.)

That the Court therein gave and made its final judgment or decree, which is set out in full, (page 170–2,) quieting Holladay's title as to 19 20 of this land; that the land there involved was the land here involved.

XVI.

"That in said cause the question in issue and litigated was, whether the land here in controversy had ever been dedicated to the public use claimed by the people (plaintiff) in the present action." (P. 173.)

XVII.

"That said action was defended by the City and County of San Francisco."

XVIII.

"That the judgment therein was against the claim of dedication made by said City, being the same claim of dedication made by plaintiff herein."

XIX.

"That by reason of said judgment, all the matters of dedication and title involved and in issue herein are *res judicatae*."

Such are the findings of fact *herein* regarding the character of the action and the character of the judgment in said cause, Holladay *vs.* San Francisco. And these findings of fact are amply supported by the findings of the Court in that case, which are so embodied into these findings. (Pages 148–172.)

We now come to the findings of fact *herein* regarding the third defense, *i. e.* the action, San Francisco *vs.* Holladay et al.

Those findings begin with finding XX, on page 174, and run through finding XXVII, on page 185.

Briefly stated, the Court finds herein:

That in Oct., 1883, the City of San Francisco brought an action against these very defendants, alleged herself *siezed in fee* of these same parcels of land described, in trust for the people of the State of California, as a public park, &c. (. 174).

That these same defendants answered therein; that the case was tried in good faith, and the Court gave and made its findings and decision in writing therein, which findings therein are set out literally in finding XXII herein (pp. 176–183).

That afterwards the Court, in that case, duly gave and made its judgment therein, (p. 184,) "whereby it was ordered, adjudged, and decreed that the City and County of San Francisco, plaintiff, do take "nothing by this action as against * * * defendants," (naming the defendants the same who are defendants herein,) "but that judg-

"ment be and the same is hereby entered herein in favor of the said "defendants." * * *

XXIV.

"That said judgment has never been appealed from, reversed or modified."

XXV.

"That the action last above mentioned was instituted and to the termination thereof was prosecuted and conducted by said City and County of San Francisco."

XXVI.

"That in said action (City and County of San Francisco *vs.* Holladay) the question in issue and litigated was whether the land here in controversy had ever been dedicated to the public use, claimed by the people (plaintiff) in the present action; and the judgment therein was against said plaintiff upon that issue."

XXVII.

"That by said judgment (in City and County of San Francisco *vs.* Holladay) all the matters in issue and involved herein are *res judicatae*."

Such are the findings of fact herein respecting the action, San Francisco *vs.* Holladay.

The Court found as its conclusions of law herein from the foregoing facts (page 187).

I.

"That the before-mentioned action of Holladay *vs.* the City and County of San Francisco was defended by the City and County of San Francisco for the use and benefit of the people of the State of California, as well as on its own behalf.

II.

"That the judgment in said last named action is, as a plea, a bar, and as evidence conclusive against the claim of plaintiff herein as to an undivided nineteen-twentieths (19–20) of the land in dispute in this action, and by reason thereof plaintiff is not entitled to the relief demanded in the present action.

III.

"That the aforesaid action of the City and County of San Francisco *vs.* Holladay was instituted, and to the termination thereof was prosecuted and conducted by said City and County of San Francisco in the interest of and for the use and benefit of the people of the State of California, and as their representative, as well as for said City and County of San Francisco, plaintiff therein.

IV.

"That the judgment in the last named action (San Francisco *vs.* Holladay) is, as a plea, a bar, and as evidence conclusive against the entire claim of dedication made by the plaintiff in the present action, and as to all the land involved herein.

"That by *reason of such judgments this Court is precluded* from again inquiring into the question or claim of *dedication* to public use made by the plaintiff in this action.

VI.

"That the plaintiff (the People of the State of California) is barred and estopped from setting up the claim of dedication to public use against these defendants of the lands involved in this action; and estopped from denying that defendants are the owners of the lands in fee simple absolute, and entitled to the possession thereof.

VII.

"That all the matters and questions in issue and involved in this action are *res judicatae*.

VIII.

"That the plaintiff, The People of the State of California, cannot maintain this action.

IX.

"That the plaintiff herein, The People of the State of California, take nothing by this action, but that judgment be entered herein in favor of defendants for their costs."

On the foregoing findings judgment was duly entered against plaintiff and in favor of defendants "that said plaintiff take nothing by this action." (P. 190.)

It is manifest from these findings that the sole question determined, or even considered, by the trial Court was, whether the claim of dedication had been previously litigated and adjudicated or not.

The trial Court did not decide the merits of the claim made in the Complaint, (*i. e.* whether this land was dedicated to public use on March 11, 1858, or ever). The Court did not even consider that question. On the contrary, having found and determined that the whole matter *had been* previously litigated and adjudicated between the parties, the Court distinctly declares itself precluded from inquiring into that question. (P. 188.)

The judgment which was entered upon those findings was "that plaintiff take nothing by this action." (Page 189–190.)

From that judgment the plaintiffs appealed to the State Supreme Court (p. 566), which Court affirmed the same, solely upon the ground of bar and estoppel.

The opinion of said Supreme Court (p. 592) shows that nothing else was considered.

Thus it is manifest that no other matter was passed upon or decided by the Supreme Court herein, but the single question of estoppel and bar by former judgments.

Plaintiffs now seek the aid of this Court to avoid the bar and estoppel.

They now claim that the land was dedicated *ex proprio vigore*, by the Act of Congress approved July 1, 1864, entitled "An Act to expedite the settlement of titles to lands in the State of California." (Trans. p. 206.)

Their present position as expressed in their assignment of errors is (p. 621–622):

"That to hold the said judgment to be a defense in this action would be to deprive the people of the rights in the land in controversy granted to them by the Act of Congress, approved July 1, 1864, entitled," etc.

The plaintiffs attempt to formulate a federal question under the judiciary act.

But their difficulty is, their own complaint shows, that they did *not* and now cannot claim any dedication under the Act of July 1st, 1864, and the decision now complained of is *not against* any such claim of dedication. On the contrary, they distinctly set up in their complaint that the land was dedicated by the lawful owner, March 11, 1858, obviously referring to our State Statute of that date which they put in evidence. And when we examine the decision, we find it is not a decision against that asserted dedication, or against any asserted dedication whatever.

It is merely a decision that the question of dedication has been tried several times before; that the plaintiffs are estopped; that the alleged cause of action is *res judicata*, and that the action is barred by former judgments.

It was not necessary, in order to arrive at the decision herein, for the Supreme Court of California to decide either for or against this claim, that this land was dedicated by that Act of Congress.

It was not necessary to decide that question in this case, because it was decided in the former cases, and the judgments precluded its further examination.

It was sufficient, in order to arrive at the decision in question, for the Court to decide, as it did decide, that the people of the State were barred and estopped by the former judgments, which made the whole matter *res judicata*.

If those judgments were originally wrong, if *they* decided against a dedication or right arising under said Act of July 1, 1864, a writ of error would *then* have been the appropriate remedy.

But those two judgments were permitted to stand and became final. They were not even appealed from.

The present record is on all fours with the case, San Francisco *vs.* Itsell, 133 U. S. 66–67.

There, as here, the plaintiff sued to have it adjudged that the land

was part of a public park lawfully dedicated to public use. There, as here, the claim of dedication arose out of the Van Ness Ordinance and Map, the ratifying State Statute of March 11th, 1858, and the Fifth Section of the Act of Congress of July 1st, 1864. There, as here the plaintiff introduced the matters aforesaid as evidence of dedication. There, as here, defendants pleaded bar and estoppel by former judgment; and there, as here, the trial Court and the Supreme Court of the State on appeal sustained that plea, and decided that the matter was *res judicata*.

There, as here, the plaintiff took a writ of error to this Court, claiming, as these plaintiffs here claim, that the land had been dedicated by the Fifth Section of the said Act of Congress of July 1st, 1864, and that the decision of the Supreme Court amounted to a denial of such right or claim of dedication.

The defendants there moved to dismiss the writ of error, on the ground that this Court had no jurisdiction.

It was dismissed.

This Court then said:

"In the present case the record of the Pleadings, Findings of Fact and Judgment shows that it was unnecessary for that Court to decide, and its opinion filed in the case and copied in the record shows that it did not decide any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error, was a bar to this action. That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States."

San Francisco *vs.* Itsell, 133 U. S. 66–67.
See S. F. *vs.* Scott, 111 U. S. 769.

Accordingly, we ask that the same doctrine be applied here, and that this writ of error be dismissed.

A False Quantity.

At the beginning of the findings of fact (page 141), appears the following:—

"The land described in the complaint was by Section 5 of the Act of Congress of July 1st, 1864, to expedite the settlement of titles to lands in the State of California, ratifying the act of the Legislature of said State, approved March 11th, 1858, and the ordinances therein recited, dedicated to and accepted by the public as a public park."

That *purports* to be a finding of fact.

It is a mistake, however, to regard that as a finding of fact.

For the issue made by the answer was bar and estoppel. That issue alone was tried, and that issue was fully and expressly sustained.

The controlling findings in this case are those which show the former judgments to have rendered the present question of dedication *res judicata*. The conclusion of law is the bar and estoppel. The Court plainly adjudged and declared itself precluded from again *in-*

quiring into the question of dedication, and declared the plaintiffs barred and estopped from again litigating it.

Consequently this finding, that the land was dedicated, is plainly an assertion upon a subject which the Court did not and cannot examine into, and is therefore, as a finding, innocuous.

Now, as a matter of fact, the Supreme Court of California simply ignored that paragraph, treating it as incongruous and extraneous matter.

The opinion of said Court (page 592) rests solely on the fact that the bar and estoppel of those judgments preclude further investigation of the question of dedication.

What legal value then, can attach to this declaration that the land *was in fact dedicated?*

For how can any Court effectively find the existence of a matter which it cannot and does not enquire into?

Another reason, which will prevent this from being regarded as a finding of fact, is that the complaint does not aver any dedication by the Act of Congress of 1864; but, per contra, avers a dedication March 11, 1858, the date of the State Statute.

Nevertheless, plaintiffs' counsel has constructed his alleged federal question solely upon this so-called finding of fact.

Upon the theory that the State Supreme Court accepts the findings of the trial Court, counsel assumes that the Supreme Court necessarily accepted and adopted *this* finding as an element in their decision.

Counsel for plaintiffs, in his assignment of errors, says (p. 620–21), "The Supreme Court of California, having first declared that the land in controversy was in fact dedicated to the public as alleged in the complaint, it was error then to overrule the objections interposed by the plaintiffs to each of the judgments in the cases," * * * &c., (naming said actions pleaded in estoppel.)

And on page 622, he says:

"It was likewise error to decide that the said right of the public to said land derived under the United States, was set aside by said judgments," &c.

Thus this false quantity, inserted among the findings of fact, and which from the very nature of the decision cannot be a true finding or fact, is sought to be used as if it were a true and pertinent fact established upon the trial of that issue, in the face of the record showing that the Court would not, could not, and did not try or even enquire into the question.

We have asserted that the Supreme Court of California did not decide upon the question of dedication, and did not even consider that matter.

This record contains the three successive opinions or decisions of the Supreme Court of California, rendered in this case on three successive appeals.

The last decision, (page 592,) does little more than to refer to the former (the second) decision as having established the law of the case; and refers to said second decision, saying, (page 592,) "for the reasons given in that opinion the judgment and order must be affirmed."

It was in the decision rendered on the second appeal (pages 581–593) that the Supreme Court of California laid down the legal proposition which makes our judgments good in bar and estoppel.

We had at that time pleaded in defense only one judgment against the City of San Francisco. And the language of the decision shows that the Court addressed itself directly and solely to the question, whether that judgment was a good defense against the State, in these words, (p. 584):

"3. This brings us to consider the effect of the judgment in the case of Holladay *vs.* City and County of San Francisco." * * *

(585), "The pleadings in that case being sufficient to put in issue the question of dedication involved herein, what is the effect of such judgment upon the rights of the present plaintiff? Are the people of the State thereby estopped from asserting that the defendant in that action, the City and County of San Francisco, did hold and now holds the legal title to the land in controversy, in trust for the use of the people of the State as a public square?"

The opinion then discusses the right of a municipal corporation to represent the people of the State in litigation, concerning questions of dedication, resulting in the conclusion, expressed thus (p. 587):

"We entertain no doubt that the City and County of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares or land claimed as such within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the State itself is bound by the result of such litigation."

And the Court holds said judgment "to be equally binding upon the State as upon the city," and that its effect is as "a bar to the right of the plaintiffs to the relief demanded in this action."

After that decision we had another trial. We had filed a supplemental answer (p. 134) pleading our judgment in the case, S. F. *vs.* Holladay.

Accordingly in its decision on the last appeal (p. 592), the Supreme Court extends to that defense the same rule of law which it had applied to the judgment in Holladay *vs.* S. F.

It thus appears that the Supreme Court of California did not adopt as any part of its decision the alleged finding upon which counsel relies. It did not decide for or against any right or title arising under any act of Congress.

The sole matter decided was whether the judgments were a bar and estoppel; a matter dependent only upon the right of the City of San Francisco to represent the State.

Hence there is not and cannot be any federal question involved in said decision.

If the matter of dedication were an open question in this case and it were now necessary to decide, for the first time, whether this land belongs to defendants in private proprietorship or whether it is a duly dedicated public park, the matter would be determined by reference to the City Ordinances as ratified by the State Statute of March 11, 1858.

It would not be determined by reference to the Act of Congress.

If either party should attempt to prosecute his action in the Federal Courts upon the theory that the claim—either of dedication or title—arose under the Act of Congress, he would fail. For this Court has already decided, (Hoadley *vs.* San Francisco, 94 U. S. 6,) that the conflicting claims, of dedication and title respectively, (to lands in San Francisco,) made under the Van Ness Ordinance as ratified by the State Statute of March 11, 1858, do not arise under the Act of Congress of July 1, 1864.

In that case Hoadley, (who claimed under the Van Ness Ordinance certain land which the city claimed as a park,) removed his case from the California State Courts into the United States Circuit Court, alleging that his right arose under the said Act of Congress.

The Circuit Court sustained a demurrer to his bill; and upon writ of error this Court affirmed the same in the following language:

Hoadley *vs.* San Francisco, 94 U. S. 6.

"The questions involved did not arise under the laws of the United States, but under the ordinances of the City as ratified by the Act of the Legislature. The Act of Congress operated as a release to the City of all the interest of the United States in the land. The title of the United States was vested in the City. Whether the City took the beneficial interest in the property as well as the legal title, depended upon the effect to be given to the Act of the Legislature and the ordinances, and not upon the Act of Congress. The case is precisely the same in principle as it would have been if the City had previous to the Act of Congress, conveyed the land to Hoadley by deed, with covenants of warranty. If in such a case a controversy should arise between Hoadley and the City, as to whether or not the title granted to the City inured to his benefit under the warranty, the question would not be as to the effect of the grant from the United States, but as to that of the conveyance from the City. The case would not arise under the laws of the United States, but under the deed and its covenants."

That decision would seem conclusive here.

It shows (if it were pertinent here) that the original contention between these parties did not arise under the Act of Congress.

It applies to the contention of these plaintiffs (that the land was dedicated), as well as to our contention that the land was granted to us.

Neither party took any new right or title under said Act of Congress; but the right of each arose under the City ordinances as ratified by the State Statute.

It follows, therefore, that this declaration by the trial Court (p. 141) that this land was dedicated by said Act of Congress, though placed there as if it were a finding of fact, yet is not such.

And even if this case involved the original contention between Holladay and these plaintiffs, as to whether this land was private property or a public park, the case would not involve a federal question.

But when we remember that the complaint *avers* no dedication by the Act of 1864, but only one by the State in 1858, we see that the federal question is beyond the issues.

The decision of the Supreme Court considers only the question of the sufficiency of the judgments in bar and estoppel, bases its decision solely upon that ground, and utterly disregards the alleged finding that this land was dedicated by the Act of Congress, as being so much extraneous matter.

We therefore protest that the assignments of error made by plaintiffs are unfounded in fact. The Supreme Court of California has not decided against any right or claim arising under the said Act of Congress.

There is no federal question, and this writ of error should be dismissed.

Respectfully submitted,

S. W. HOLLADAY,

In *Pro. Per.*, and Attorney for Defendants.

San Francisco, Sept. 26, 1895.

OCT 26 1895
JAMES H. McKENNEY,
CLERK.

15,839.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 566.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,

vs.

S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, MARY W. MASTICK, EXECUTRIX OF THE WILL OF S. L. MASTICK, DECEASED, AND R. G. DAVISSON,
Defendants in Error.

REPLY OF PLANTIFFS IN ERROR, TO DEFENDANTS' BRIEF FILED, IN SUPPORT OF THEIR MOTION TO DISMISS THE WRIT OF ERROR HEREIN FOR WANT OF JURISDICTION.

15,839.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
S. W. HOLLADAY, GEORGIA C. O. HOLLADAY, MARY W. MASTICK, EXECUTRIX OF THE WILL OF S. L. MASTICK, DECEASED, AND R. G. DAVISSON,
Defendants in Error.

Reply of Plaintiffs in Error, to Defendants' Brief Filed, in Support of Their Motion to Dismiss the Writ of Error Herein for Want of Jurisdiction.

THE FEDERAL QUESTION INVOLVED.

The Supreme Court of the State of California first decided that the land in controversy was in fact, dedicated to the public, as alleged in the complaint, by the Van Ness Ordinance, the Act of the Legislature of California, and the Act of Congress of July 1, 1864, entitled An Act to Expedite the Settlement of Titles to Land in California. It then decided that the dedication was annulled by the judgments given in the suits of S. W. Holladay vs. the City and County of San Francisco, and of the City and County of San Francisco vs. S. W. Holladay and others. To these two records the people of the State of California were strangers. The State never consented that the city and county might submit the rights of the public to judgment in either of those actions.

Hence they claim, that those judgments, so far as the people are concerned, were given without due process of law.

The statement of the case, made by the defendants in error in their brief, is inaccurate, and is incomplete.

"The action was brought by the Attorney-General in behalf of the people of the State." Opinion of the Supreme Court of the State of California, by Mr. Justice DE HAVEN.

Transcript, p. 224, present paging.

The object of the suit was, to remove the buildings and fences of the defendants, from what the complaint alleges to be a part of a public park. By these obstructions the public was excluded from a part of the park.

The action was brought, in discharge of the duty "which requires the Government of the State to preserve," "for the use of the public," "property" which had been dedicated "to the whole people."

The defendants in their brief, on this motion, contend that the Supreme Court of California did not decide that the land in question was dedicated to the public.

In support of this contention the defendants assert that the plaintiffs allege that the land was dedicated, as a park, on the 11th of March, 1858, and that, therefore, the plaintiffs are precluded from relying upon the fifth section of the Act of Congress of July 1, 1864, 13 Statutes, 332. (This section is set forth at page 61 of printed transcript.)

The date was immaterial.

It was so ruled in *Thrall* v. *Smiley*, 9 California, 536, thirty-seven years ago. Opinion by Mr. Justice FIELD.

It is averred in the complaint that a certain tract of land, embracing the land in controversy, "was heretofore, viz: on the 11th day of March, A.D. 1858, by the lawful owner thereof, lawfully dedicated to public use as a public square, by the name of 'Lafayette Park,' and such dedication accepted by the public; and then was, and still is, laid down upon the official map of said city and county as a public square, as aforesaid."

Transcript, p. 2, present paging.

The date here stated, under a *videlicet*, is the date of the Act of the Legislature of California by which the Van Ness Ordinance was confirmed.

This Act of the Legislature is quoted at large, from pages 61–66 of the transcript, present paging.

The aforesaid averment was met by the following denial, found

in the answer of the defendants S. W. and G. C. O. Holladay and Davisson, and also in the answer of the defendant Mastick:

"They deny that the land firstly described in the complaint "was, on the 11th day of March, 1858, or ever at any time, dedi- "cated to public use, either as a public square, or for any public "use whatever. They deny that it was ever dedicated to public "use by the name of Lafayette Park, or otherwise, or that any "dedication thereof was ever accepted by the public." * * *

Transcript, pp. 7-8; *Ib.*, p. 17.

There were other defenses set up in the answers.

They are briefly and fairly stated by the Supreme Court of California, in its second opinion, being the opinion delivered on the second appeal, in Bank, Feb. 4, 1892, and found from pages 224 to 229 of the present transcript.

We quote:

"In their answer defendants deny that the land described in the complaint was ever dedicated to public use as a square, and also allege that on November 16th, 1863, the plaintiff therein, upon the relation of one Bohen, commenced an action against S. W. Holladay, one of the defendants herein, and through whom the other defendants claim; that in said action the same identical matters alleged in this complaint were in issue and judgment therein was finally rendered against this plaintiff and in favor of defendant Holladay—is also particularly averred as a separate defense that in said action one of the material issues was whether the land here in controversy was ever dedicated to the public as a square, and that this issue was found and adjudged against plaintiff. The answer further alleges, as a separate defense, that on December 17th, 1864, the defendant S. W. Holladay commenced an action against the City and County of San Francisco to quiet his title as against all adverse claims of said city and county to the land in controversy, and that judgment was therein given to the effect that said Holladay was the owner of an undivided nineteen-twentieths of said land, and his title thereto was quieted as against the said city and county, and in this connection it is further alleged that one of the material issues tried in that action and determined adversely to the present claims of the plaintiff herein was whether the land in controversy had ever been dedicated to the public use as a square and whether said city and county held the legal title hereto in trust for the people of the State. The present action was tried by the Court without a jury and findings filed to the effect that the matters alleged in the answer of the defendants were true and judgment was hereafter entered for the defendants. Subsequently

the Court granted plaintiff's motion for a new trial, and from this order the defendants appealed.

"The land in controversy is within the corporate limits of the City of San Francisco as defined by the Act of the Legislature of this State of April 15, 1851 (Stats. 1851, p. 157), and all the right and title of the United States thereto were, by Section 5 of the Act of Congress of July 1, 1864, to expedite the settlement of titles to lands in the State of California (13 U. S. Stats. at Large, 332), 'relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinance of said city ratified by an Act of the Legislature of the said State approved on the 11th of March, 1858.' It is conceded that this land forms a part of the tract designated as Lafayette Park upon the map, showing the location of streets and public squares in the City of San Francisco, the map approved by one of the ordinances of said city, ratified by the Act of the Legislature of this State approved March 11, 1858 (Stats. 1858, p. 52), and referred to in the Act of Congress of July 1, 1864. It further appears from the evidence that the defendants and their successors in interest were in the actual possession of the land on January 1, 1855, and so continued until after March 11, 1858."

The Court declared that Lafayette Park had been dedicated to public use by the Van Ness Ordinance, the Act of the Legislature of California, and the Act of Congress.

Its language is as follows:

"It has been repeatedly held by this Court that the Act of the Legislature of March 11, 1858, ratifying and confirming the ordinance referred to, operated as a selection and dedication to public use of the tracts marked as public squares on the map approved by that ordinance, and that the above mentioned Act of Congress of July 1, 1864, had the effect to confirm such dedication and make it operative upon the legal title as well as upon such title as the city held prior thereto (*Hoadley* v. *San Francisco*, 50 Cal. 263; *Sawyer* v. *San Francisco*, 50 Cal. 370; *Hoadley* v. *San Francisco*, 70 Cal. 320). This being so, it follows that the land in controversy was in fact dedicated to the public, as alleged in the complaint, and, as a consequence, defendants never acquired any title thereto by virtue of the possession of themselves or predecessors and the Act of the Legislature of this State of March 11, 1858, or the ordinances thereby ratified. The plaintiff is, therefore, entitled to maintain this action unless estopped by one or the other of the judgments relied upon by defendants as a bar."

Transcript, p. 225. Opinion by Mr. Justice DE HAVEN on the second appeal.

Under the practice in California, the *nisi prius* court must find upon every material issue made by the pleadings.

C. C. P., 632–33.

Accordingly on the new trial ordered—the third trial—the Court made the following finding:

"I.

"The land described in the complaint was by Section 5 of the Act of Congress of July 1st, 1864, to expedite the settlement of titles to lands in the State of California, ratifying the Act of the Legislature of said State, approved March 11th, 1858, and the ordinances therein recited, dedicated to and accepted by the public as a public park."

Transcript, p. 30.

It also found:

"The land in controversy in this action forms a part of the tract of land laid down on the official map of San Francisco as Lafayette Park."

Transcript, p. 51.

The alleged bar of the judgment, in the People of the State, at the relation of *Bohen* v. *Holladay*, had been disposed of against the estoppel, on the first appeal.

Transcript, pp. 221–223, present paging. Opinion by Mr. Justice Ross.

The ruling was adopted in the opinion on the second appeal.

Transcript, pp. 225–226.

These determinations left the defendants without any defense to the action, unless the rights of the public were cut off by the judgments in the cases of *Holladay* v. *San Francisco* and *San Francisco* v. *Holladay*.

In regard to the record in *S. W. Holladay* v. *San Francisco* the Court, by its second conclusion of law, declared:

"II.

"That the judgment in said last named action, is, as a plea a bar, and as evidence conclusive against the claim of plaintiff herein as to an undivided nineteenth-twentieths ($\frac{19}{20}$) of the land in dispute in this action, and by reason thereof plaintiff is not entitled to the relief demanded in the present action."

Transcript, 5. 51.

In regard to the record in *San Francisco* v. *Holladay*, in the fourth conclusion of law, the Court declared:

"IV.

"That the judgment in the last named action (*San Francisco* v. *Holladay*), is, as a plea a bar, and as evidence conclusive against the entire claim of dedication made by the plaintiff in the present action, and as to all the land involved therein."

Accordingly, judgment was entered for the defendants.

The Court placed its judgment on these two alleged estoppels.

This judgment was affirmed on appeal—the third in the case.

The appellate court adopted the opinion of Mr. Justice DE HAVEN, saying that it would be useless "to restate the views there expressed."

Transcript, pp. 230–31. Opinion of Mr. Justice MCFARLAND.

When the judgment in the case entitled *S. W. Holladay* v. *The City and County of San Francisco* was brought forward (printed Transcript, p. 95), the following proceedings were had:

"To the complaint, summons, answer, findings and judgment, just referred to, the plaintiffs objected at the time that each and all of said documents, papers and proceedings were irrelevant to any issue in this action:

"First. Because the plaintiffs are strangers to the record in which the judgment was given—were never served with process therein and never authorized the submission of the rights of the plaintiffs to adjudication in said action.

"Second. That to hold the said judgment to be a defense in this action would be to deprive the people of the rights in the land in controversy, granted to them by the Act of Congress, approved July 1st, 1864, entitled an Act to expedite the settlement of titles to lands in the State of California, and derived by them under the Act of Congress, approved March 8th, 1866, entitled an Act to quiet title to certain lands within the corporate limits of the City of San Francisco; and under an Act of Congress approved July 23rd, 1866, entitled an Act to quiet land titles in California; and under an Act of Congress, approved March 3rd, 1851, entitled an Act to ascertain and settle private land claims in the State of California, and under the Acts of Congress amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights, secured by the Constitution of the United States and especially by the 5th and 14th amendments thereof.

"The Court overruled said objections, to which ruling the plaintiffs at the time duly excepted."

When the second record was brought forward, namely: the record in *San Francisco* v. *Holladay* (printed Transcript, pp. 96–207) the following proceedings were had (*Ib.* pp. 207–8):

"The plaintiffs objected to the said record, and to the said papers offered from the record and files in the said case of *The City and County of San Francisco* v. *S. W. Holladay et al.*, on the following grounds, to wit:

"That the same and every part thereof, are irrelevant to any issue in this action, because the plaintiffs in this case are strangers to the said record—never authorized the institution of the suit, and never authorized any one to submit the rights of the people to adjudication therein.

"That to hold the said judgment in the said action to be a defense to this action would be to deprive the people of the rights in the land in controversy, granted to them by the Act of Congress, approved July the 1st, 1864, and entitled an Act to expedite the settlement of titles to lands in the State of California, and derived by them under *the* Act of Congress, approved March 8th, 1866, entitled an Act to quiet land titles in California; and under an Act of Congress, approved March 3rd, 1851, entitled an Act to ascertain and settle private land claims in California; and under the Acts of Congress amendatory thereof, without due process of law, in disregard of the guarantees of public and private rights secured by the Constitution of the United States, and especially by the 5th and 14th amendments thereof.

"And further, that the people having themselves, through their Attorney-General, instituted the present action, even if in any event, the people could have been bound by a judgment rendered in a case instituted by the City and County of San Francisco against the same defendants, this Court and its predecessors, the District Court, had equal jurisdiction of the subject-matter, and could not be ousted of its jurisdiction, or bound by a subsequent action, which the people of the State did not institute.

"Which objections were by the Court overruled, and the evidence was admitted, to which ruling the plaintiff at the time excepted."

These objections were urged, and were overruled in the appellate court.

LEGAL PROPOSITIONS.

The plaintiffs contend that the two last named judgments were void, because the rights of the public to their public ground, were cut off, without due process of law.

Plaintiffs submit, that this question arises, on the record of this case.

In neither of the judgments—*Holladay* v. *San Francisco*, or *San Francisco* v. *Holladay*—were the people of the State parties to the record.

As to the record in *Holladay* v. *San Francisco*, it is important to be considered, that the State of California cannot be sued in its courts without its consent.

In *Sharp* v. *Contra Costa County*, 34 Cal. 291, it is said: "The State government, neither in its general, nor in its local capacity, can be sued by her creditors, or made amenable to judicial process, except by her own consent."

The matter to be decided is, did the State consent that the City and County of San Francisco might submit the rights of the public in Lafayette Park to judgment?

This inquiry, must be answered, by the section of the Act of the Legislature of California giving the Board of Supervisors of San Francisco such power as it possessed, over public grounds.

This power is found in Section 74 of the Consolidation Act, as it is called, incorporating the City and County of San Francisco, in force at the date of the commencement of the suit of *Holladay* v. *San Francisco*.

The portion of this Act affecting that matter is as follows:

"The Board of Supervisors of the City and County of San "Francisco shall have power by regulation or order. * * * "Eighth—to provide for enclosing, improving and regulating all "public grounds of the city and county at an expense not to exceed "two thousand dollars per annum." Statutes of California, 1861, p. 551.

This Court will also decide, for itself, whether the Attorney and Counselor of the City and County of San Francisco, possessed the power to supersede the Attorney-General.

This inquiry must be answered by the Act of the Legislature creating the office of Attorney and Counselor of the city and county. It is as follows:

"Chap. DXXVII.—An Act amendatory of an Act providing for "an Attorney and Counselor in and for the City and County of "San Francisco, approved March twenty-fifth, one thousand eight "hundred and sixty-two.

"[Approved April 27, 1863.]

"*The People of the State of California, represented in Senate and "Assembly, do enact as follows:*

"SECTION 1. Section one of said Act is hereby amended so as "to read as follows:

"SECTION 1. There shall be elected hereafter, for the City and "County of San Francisco, by the qualified electors thereof, on the "third Tuesday of May, eighteen hundred and sixty-two, and every "two years thereafter, one attorney and counselor, learned in the "law, who shall hold his office for two years, and until his suc- "cessor shall have been duly elected and qualified, and shall be "paid by said city and county a salary of five thousand dollars "per annum, to be audited and paid monthly, in the same manner "as the salary of the County Judge is by law audited and paid. "Said attorney and counselor shall perform such duties as attor- "ney and counselor in and for the said city and county as the "Board of Supervisors of said city and county shall, from time to "time, prescribe."

Statutes of California, 1863, p. 771.

The powers of the attorney and counselor of San Francisco have been considered by this Court.

In *San Francisco* v. *LeRoy*, 138 U. S. 656, a judgment, similar in all material matters, was before this Court.

The Court states in its opinion, speaking through Mr. Justice FIELD, that "whatever authority the attorney of the city and county "may have had over its ordinary legislation, he had none to relin- "quish rights secured for the public by the Van Ness Ordinance." (660.)

If the city and county could be brought into court to answer as to the rights of the public, its attorney could appear in such an action; and if its attorney could appear he could "suffer judgment" against his client.

Weeks on Attorneys, p. 375.

These statutes, this Court must construe for itself.

This Court is not bound by the construction of a State court of a statute of a State, where the question is, has there been due process of law.

" In every such case, this Court must decide for itself the true construction of the statute."

Scott v. *McNeal*, 154 U. S. 45;
Pennoyer v. *Neff*, 95 U. S. 714.

It is important to be considered that, looking to the record in *Holladay* v. *San Francisco*, it will be seen that there was no attempt to put in issue, in that case, the rights of the public.

The allegation in the complaint in that case (printed transcript, p. 82) is that the plaintiff " is the owner in fee-simple absolute and in possession " of the land, describing it.

The answer was a general denial. *Ib.* 83.

The judgment did not attempt to deal with, nor did it mention, the rights of the public.

The judgment was that Holladay was " the owner in fee-simple absolute of an undivided $\frac{19}{20}$th of the land," and that the City and County of San Francisco " is the owner of one-twentieth and no more " of the land.

Printed Transcript, p. 94.

No State officer took part in the trial of the case, or appeared in the case, at any stage thereof.

In reference to the second record—*San Francisco* v. *Holladay*—another fact is important to be considered.

The present suit of the people was commenced March 5, 1878.

Printed Transcript, p. 4.

The action of *San Francisco* v. *Holladay* was commenced October 23, 1883.

Transcript, p. 96; orig. p. 286.

Had the City and County of San Francisco the power to supersede the action which the State had commenced?

Had the attorney of the city, the authority, to set aside the legal proceedings, to protect public rights, which had been instituted by the Attorney-General?

These are questions to be decided in passing on the latter record.

Case cited by defendants in support of their motion:

San Francisco v. *Itsell*, 133 U. S. 66–67, is not in point in this case.

In that case, the record pleaded as an estoppel was between the City and County of San Francisco and the predecessors of Itsell.

The parties, therefore, were the same in both records.

Here, the City and County of San Francisco is not the plaintiff.

San Francisco v. *Scott*, 111 U. S. 768, did not involve the question presented by this record. In that case, there was no judgment pleaded as a bar.

Hoadley v. *San Francisco*, 94 U. S. 4; 124 U. S. 639, does not support the contention of the defendants in error.

In that case, when first in this Court (94 U. S.), it was decided that "the rights of the parties depended upon the effect to be "given to the Act of the Legislature and the ordinances, and not "upon the Act of Congress" (6).

There was no judgment pleaded in bar, as was in this case.

Hoadley v. *San Francisco*, 124 U. S. 639, came again to this Court.

After the case had been remanded by the Circuit Court to the State court, it was tried in the State court, and was taken to this Court from the State Court, by writ of error.

The case was heard upon an alleged error, assigned "that the Act of the Legislature of California of March 11, 1858, ratifying the order of the Board of Supervisors," adopting the map of the city, in respect to the reservation of squares for public purposes, impaired the obligation of the contract of grant in Ordinance 822, in violation of Article 1, Section 10, of the Constitution of the United States.

Ib., 645.

The further error was assigned, that under the decision of the State court, "that part of the Act of 1858 took plaintiffs' property "without due process of law, and without just compensation, in "violation of the Fifth Amendment to the Constitution of the "United States." Upon these assignments of error, this Court heard and decided the case on its merits.

The opinion was delivered by Chief Justice WAITE.

In it, the facts on which the rights of the public to its parks depended were reviewed, and the title of the public affirmed.

W. F. FITZGERALD,
Attorney General.

WILLIAM MATTHEWS,
WILLIAM CRAIG,
Of Counsel.